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United States Code, Title 28:
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DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil No. 46C 1604

CORN PRODUCTS REFINING COMPANY,
Plaintiff,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, the plaintiff-appellant respectfully presents the following statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above entitled cause sought to be reviewed.

A. Jurisdiction

The statutory provisions believed to sustain the jurisdiction of the Supreme Court on appeal are:

(a) Title 28 U. S. C. A., Sec. 345, which provides in part as follows:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court

may be had where it is so provided in the following sections or parts of sections and not otherwise:

* * * * * *

"(4) So much of sections 47 and 47a of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission other than for the payment of money."

(b) Title 28, U. S. C. A., Sec. 47a, which provides in part as follows:

"A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

and

(c) Title 28, U. S. C. A., Sec. 44, which provides in part as follows:

"The procedure in the district courts * * * (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title."

This being an action "to enjoin, set aside, annul or suspend in whole or in part" orders of the Interstate Commerce Commission is a case "specified in Section 44 of this title."

The following decisions sustain the jurisdiction of the Supreme Court to review the final decree and order on direct appeal in such a case:

Ann Arbor R. Co. v. *United States*, 281 U. S. 658;
Atchison, T. & S. F. Ry. Co. v. *United States*, 284 U. S. 248;
Texas & Pacific Ry. Co. v. *United States*, 289 U. S. 627;
United States v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499;
United States v. *Hancock Truck Lines*, 324 U. S. 774.

B. Statutes, the Validity of Which Is Involved

There is not involved the validity of any statute of a State or of a statute or a treaty of the United States. There is involved the validity of an order of the Interstate Commerce Commission, hereinafter described.

C. Date of the Judgment and Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented.

The decree appealed from was entered on the 9th day of December, 1946. A motion to set aside said decree, the findings of fact and conclusions of law, and for a new trial was served by appellant on opposing parties on the 14th day of December, 1946. Said motion was duly and seasonably presented to the District Court on December 19, 1946, and was on said date entertained and taken under advisement by said court. On February 6, 1947, the District Court by the three judges constituting the special statutory court, entered an order denying said motion.

The petition for appeal together with the assignment of errors was presented to the court on the 3rd day of April, 1947, and allowed by order on the same date.

The appeal was therefore taken seasonably.

Morse v. *United States*, 270 U. S. 151, 153;
Bowman v. *Loperena*, 311 U. S. 262, 266;
United States v. *Hancock Truck Lines*, 324 U. S. 774.

D. Nature of the Case and of the Ruling of the District Court

This is a suit instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division, before a specially constituted court of three judges under the provisions of the United States Code, Title 28, Sections 41 and 43 to 48, inclusive, seeking a review of and a final decree setting aside, annulling and enjoining an order of the Interstate Commerce Commission entered in proceedings before it entitled "*Corn Products Refining Company*, Ex Parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.*"

Appellant, a New Jersey corporation, is engaged in the processing of corn and the production of a large number of food and industrial products therefrom. It owns and operates a large plant at Argo, Illinois, located in the Chicago, Illinois switching district.

Appellant's plant at Argo began operation in 1910. Continuously from the beginning of such operation the railroads serving the plant have performed the switching of cars to and from points of loading and unloading and have done so at their line-haul rates without additional charge, the line-haul rates being treated as including compensation to them for the performance of such switching and the switching being treated as a part of the railroads' carrier service under such rates.

In 1931 the Commission instituted an investigation into the nature and extent of the terminal services embraced within the common carrier obligations of the railroads, and in its report, 209, I. C. C. 11, it laid down certain principles to govern the determination as to whether at any particular industry the switching service performed constituted a part of such common carrier service compensated for by the line-haul rates of the railroads, or whether the service was in

addition to the service contemplated by the line-haul rates published in the railroads' tariffs and was therefore service performed in violation of and contrary to the tariffs and consequently a rebate in violation of Section 6 of the Interstate Commerce Act.

Thereafter the Commission conducted supplementary investigations and took testimony regarding situations at various individual industrial plants.

Determinations and orders of the Commission in some of these supplementary investigations and related proceedings have been before the Supreme Court in other cases:

U. S. v. *Am. Tin Plate Co.*, 301 U. S. 402 (1937);
U. S. v. *Pan American Corp.*, 304 U. S. 156 (1938);
Inland Steel Co. v. *U. S.*, 306 U. S. 153 (1939);
U. S. v. *Wabash R. Co.*, 321 U. S. 403 (1944).

The determination and order involved in the present suit, although made in another supplementary proceeding, were made under circumstances and involved questions which, as hereafter submitted, distinguish this case from those cited.

In 1931 and 1932 the Commission investigated and took testimony regarding the switching operations at appellant's plant at Argo, which, as has been stated, were and from the opening of the plant in 1910 had always been performed by the railroads at their expense and had been treated as services for which the railroads were compensated by their line-haul freight rates. The Commission made no finding or determination that the practices were in any way unlawful or that the railroads were performing services beyond their common carrier duty under their tariffs or beyond the services for which their line-haul rates included compensation.

Appellant and the railroads serving its plant therefore continued their practices in the belief and on the assump-

tion that they were lawful, that the services were part of the railroads' undertaking under their line-haul rates in accordance with their tariffs, and that the railroads were compensated therefor by such rates.

Eleven years later, in 1943, the Commission reopened the proceeding for further hearing. Hearings were had, following which the Commission made the determinations and issued the order sought to be enjoined in this suit. The Commission determined that the common carrier obligation of the railroads under their line-haul rates terminated with the placement of cars by the railroads on certain tracks within appellant's plant and on certain other tracks in a railroad yard entirely outside the plant, where appellant had no access to the cars, and ordered the railroads to cease and desist from switching cars to and from points of loading and unloading within the plant unless an additional charge should be made for this service. The Commission's order would thereby put an end to a practice which has existed for over a period of 36 years and upon which plaintiff has relied in making its shipments and conducting its business. As a consequence of the Commission's order, appellant was confronted with one or the other of the two following alternatives. The Commission's order would be satisfied if appellant should itself perform the switching between the points designated by the Commission in its yard and the yard of the Indiana Harbor Belt Railroad and points of loading and unloading. However, appellant has no locomotives, crews and facilities with which to do this. The Commission's order might also be complied with if the railroads should collect charges in addition to their line-haul rates for such switching. This would impose upon appellant additional transportation charges not contemplated when its plant was located and in its operation in the 36 years since then. And as appellant sought to show, it would require appellant to pay additional charges not paid by any

of the thousands of other industries large and small or shippers in the Chicago Terminal area, where the railroads perform the switching of cars at the same line-haul rates as are paid by appellant.

Appellant then instituted this suit praying an injuction setting aside and annulling the Commission's order. Among grounds for its suit, appellant alleged that the Commission acted arbitrarily and unlawfully and denied it a fair hearing and due process of law (a) in disregarding uncontradicted testimony of credible witnesses upon the matters in issue and in making findings contrary to such uncontradicted testimony and based only upon the Commission's previously held judgment, without support in the evidence in the record, and (b) in refusing to receive and consider a large amount of evidence offered by appellant and by the railroads, respondents in the proceeding, and that it erred as a matter of law in its decision denying effect to a tariff schedule filed by the railroads and applicable at appellant's plant providing that no charge in addition to the line-haul rates would be made for switching cars to and from points of unloading and loading in the plant except under certain conditions specified in the traiff.

The District court of three judges denied the relief prayed for and dismissed the appellant's suit. The grounds of its decision are set forth more fully under the next heading.

E. Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

1. The Commission's order would impose upon appellant additional transportation expense amounting, in all probability, to several hundred thousand dollars annually. It would require it, in order to continue operation, either to obtain its own locomotives and crew and perform the

spotting of cars, which for 37 years has been performed by the railroads at their line-haul rates, or to pay additional charges to the railroads for the service, which additional charges are not demanded of any other industry, large or small, in the Chicago terminal area, paying the same line-haul rates as paid by appellant for whom the railroads switch cars to and from points of unloading and loading. In this regard alone substantial issues are involved.

2. Appellant challenges the Commission's order as being arbitrary, contrary to and without support in the evidence, and as based upon privately held views of the Commission not supported by proof and referred to by the Commissioner who presided at the hearing as the Commission's "informed experience". Such a challenge to the validity of the Commission's order and the correctness of the decision of the District Court upholding it raises a substantial issue.

3. Conceding that it is for the Commission in the first instance to weigh the evidence, there is raised by appellant's suit the question whether the Commission may disregard uncontradicted and credible testimony, make findings directly contrary thereto on the basis of its "informed experience", and predicate an order upon such findings.

Thus, there was affirmative and uncontradicted evidence by a competent traffic officer that the line-haul rates of the railroads included compensation to them for the switching of cars to and from points of loading and unloading in appellant's plant. The Commission reached a contrary conclusion and based its order thereon.

There was also uncontradicted testimony both by the Commission's investigators and by competent railroad operating officials in charge of and familiar with the switching operations at appellant's plant that the switching of cars to and from points of loading and unloading was performed efficiently and economically; that no changes in

the track layout or method of switching operation were needed from a railroad operating standpoint; that appellant did not direct or control the switching of cars to and from points of loading and unloading in bringing cars into and moving cars from the plant; that there was no interference by appellant or by conditions or manufacturing operations in its plant with the performance of the switching by the railroads at their entire railroad operating convenience. The Commission, apparently on the basis of its "informed experience", reached a contrary conclusion and predicated its order thereon.

Whether the Commission's action was proper is an important question in the administration of the Interstate Commerce Act and in administrative procedure generally.

4. As one of the principal issues of its suit, appellant alleged that it was denied a full and fair hearing and due process of law and that the Commission's order was arbitrary and invalid in that the Commission refused to receive and consider a large amount of evidence on matters believed to be relevant and necessary to a proper determination. The Commission's action in so doing was upheld by the District Court on the ground that in the light of certain decisions of the Supreme Court the evidence offered and excluded was irrelevant, notwithstanding that the exclusion resulted in a determination resting on assumptions contrary to the actual facts which the excluded evidence would establish. Certainly in this regard substantial questions are involved.

For a full understanding of the important nature of the questions and the far-reaching effect which approval of the Commission's action and affirmance of the District Court's decision would have, a brief statement of the nature of the excluded evidence and the grounds for the decisions below is necessary.

(a) The ultimate issue before the Commission was whether the railroads were already paid by their line-haul rates for the service which for 37 years they had performed at these rates, of switching cars to and from points of unloading and loading within appellant's plant—for what is commonly called spotting—or whether appellant was receiving such services without payment and contrary to the line-haul tariffs, and was, therefore, the recipient of rebates in violation of Section 6 of the Act.

Appellant, therefore, offered evidence that the cost of switching cars to and from points of loading and unloading within its plant was considered and taken into account in arriving at the switching charges in the Chicago Terminal District, which in turn are absorbed by the line-haul railroads out of their line-haul rates. The Commission excluded this proof and then determined that the line-haul rates did not include compensation for the switching service, an impression contrary to the evidence.

(b) In its so-called basic report in Ex Parte 104, 209 I. C. C. 11, in which the Commission laid down certain standards or principles to be employed in determining the extent of a railroad's common carrier service in delivering and receiving freight and the extent of such service compensated for by its line-haul rates, the Commission said that one of the standards to be employed in determining whether the service at a particular industry is or is not in excess of the carriers' obligation and in excess of the services for which they are compensated by their line-haul rates is whether it is "in excess of the equivalent of team-track or simple switch placement" (209 I. C. C., p. 38).

Appellant's plant is in the Chicago Terminal or Switching District, so-called. The line-haul freight rates which appellant pays upon its inbound and outbound shipments are the Chicago rates, which are the same as the line-haul

rates paid by all shippers and receivers of similar freight in the Chicago Terminal District. For the purpose of affording evidentiary basis for the application of the standard or test just stated, appellant and respondent railroads endeavored to question competent witnesses and offered evidence as to the nature and extent of the terminal services involved in and what constituted team-track delivery in the Chicago Switching District under the Chicago line-haul rates. Evidence was offered that there are 438 team-track deliveries in the Chicago Terminal District, that to reach some of them involves complicated switching operations for as much as 46 miles beyond appellant's plant and that these operations are performed without added charge at the same Chicago line-haul rates as are applicable to shipments to and from appellant's plant. Evidence was also offered that there are numerous small industries in the immediate vicinity of appellant's plant and that switch placement at these small industries involves greater service and more interferences than the switching of cars to and from points of unloading and loading within appellant's plant. This evidence was not offered to show discrimination but to prove the nature and extent of the services which the railroads undertook to perform as part of their carrier obligations under the same line-haul rates as paid by appellant, to show for what terminal services the railroads are already compensated by such rates, and to afford a factual and evidentiary basis for determining whether the switching of cars to and from points of loading and unloading within appellant's plant is or is not in excess of "the equivalent of team-track delivery or simple switch placement". Since the question before the Commission was whether the services at appellant's plant were a part of the railroads' undertaking under and were compensated by the rates charged for line-haul transportation to and from Chicago, it seemed perti-

nent to prove what constituted "team-track delivery and simple switch placement" in Chicago under those rates.

The Commissioner presiding at the hearing refused to permit appellant and the respondent railroads to present any of this proof, stating that the Commission could base its decision upon its "informed experience" (R. 1407). The Commission upheld the refusal to receive the evidence, saying that the terms "simple switching or team-track delivery" and "the equivalent of team-track or simple switch placement" are "descriptive of a service well known to everyone with even a slight familiarity with railroad transportation". (Petition, p. 66.) It said also that evidence as to these services "is not necessary to advise us what we meant by 'the equivalent of team-track or simple switch placement' or the service required to make such placement". It then determined that the services involved in spotting cars in appellant's plant were in excess of "team-track or simple switch placement", although the evidence offered and excluded would have shown the opposite.

It is an important question affecting all concerned with the administration of the Interstate Commerce Act whether the Commission may rest a decision on such a subjective basis when the question is one of fact capable of proof and when proof is offered.

(c) The Commission in its basic decision in Ex Parte 104, 209 I. C. C. 11, stated also another standard that the test as to the terminal service embraced within a railroad's duty as a carrier and compensated for by its line-haul rates is "whether in the light of all the circumstances such a form of delivery is customary or reasonable" (209 I. C. C., p. 17). Responsive to this standard and to show what "form of delivery is customary and reasonable" at Chicago under the line-haul rates charged on appellant's shipments, appellant offered proof that under the Chicago line-haul rates it was customary that delivery included the switching

of cars to and from points of loading and unloading without added charge at all industries where the railroads performed the switching.

Appellant offered evidence and then made tender of proof that there was not only a general but a universal custom to this effect where the railroads performed the switching themselves. This evidence was excluded. It would have shown that it is the general practice of the railroads in the Chicago Terminal Area as well as at other large terminals that where they perform the switching to and from points of unloading they make no additional charge in addition to the line-haul rates for that service regardless of the size of the industry involved, the number of tracks, the number of cars placed or whether the particular track involved is an industry track serving a building within an industry or is a team-track; that the Chicago switching limits within which appellant's plant is located include a large area within which there are 6,853 private or industrial sidings serving 4,111 shippers; that many of the industries are larger than the plant of appellant; and that at none of the industries or 438 team-tracks within the Terminal District where the railroads perform the switching of cars to and from points of loading and unloading as they do at appellant's plant is any charge made for such switching services in addition to the line-haul rates. Other evidence was offered and refused that the whole theory of the rates to and from the Chicago Switching District is that all industries and points of receipt and delivery within the Chicago District shall be charged the same freight rates without additional charges for switching cars to and from points of loading and unloading, when the switching is performed by the railroads, regardless of the amount of switching or terminal service necessary; that the same situation obtains at all large industrial centers within the United States where the railroads perform the switching

of cars to and from points of loading and unloading whether they be at team-tracks or at points within industrial plants; that at no instance within the Chicago Terminal District in which appellant's plant is located or elsewhere within the United States is a spotting charge demanded by the railroads in addition to their line-haul rates where the railroads perform and always have performed the switching of cars to and from points of actual loading and unloading; that the line-haul rates to and from Chicago, as to and from all other large industrial centers, have always been considered as including compensation to the railroads for the full service of placing cars for loading or unloading at all industries where the railroads perform the spotting, including appellant's plant at Argo and that therefore, the imposition of an added charge would require appellant to pay twice for a service already compensated for by the line-haul rates. Proof was offered and rejected that the assessment of a charge at appellant's plant in addition to the line-haul rates for the switching of cars to and from points of loading and unloading would be inconsistent with the group rate adjustment so-called prescribed by the Commission itself and long maintained by the railroads and would destroy the entire theory of maintaining equal rates throughout a large metropolitan area regardless of the nature or extent of the terminal services performed.

This evidence was offered expressly for the purpose of showing a general practice or custom as to the terminal services constituting customary delivery and receipt of freight, and particularly of showing that it was the usual (and, indeed, universal) custom that the line-haul rates to and from Chicago, as well as to and from other large terminal districts, include compensation for switching cars to and from points of unloading and loading at all industrial plants where the railroads perform the spotting and that

such spotting is a part of the railroads' carrier service under such rates.

The evidence discussed here is to be distinguished from further evidence offered by appellant and excluded by the Commission on the authority of the decision of this Court in *United States* v. *Wabash R. Co.*, 321 U. S. 403 (the Staley case), which was designed to show that the imposition of an additional charge at appellant's plant would create discrimination against it and in favor of particular competitors having plants in the Chicago Switching District and paying the same freight rates.

The District Court upheld the Commission's ruling excluding the evidence and sustained its order. In their memorandum denying appellant's motion to set aside the decree, findings and conclusions, the three judges of the Court said that "if this were a case of first impression, this Court would be inclined to scrutinize the record in the original proceeding and the evidence which the plaintiff wishes to introduce". Nevertheless, the three judges held that because the Supreme Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402 (1937), in rejecting a contention of the appellants therein that the performance of spotting service was a part of the carrier's customary duty under the line-haul rate, had said that "the record fails to establish any such custom", and because later in discussing the payment of allowances to industries doing their own switching (as distinguished from cases like this where the railroads perform and always have performed the switching service), the Supreme Court had said further (p. 410):

> "There is no custom or practice which has the force of a rule of law that the line-haul rates include plant spotting service."

therefore, in any subsequent proceeding, such as the present, the question as to whether under the particular freight rates involved the spotting of cars is or is not customary was no longer open and proof upon the point was irrelevant and immaterial and was properly rejected by the Commission as it was here.

It is certainly a question of the most far-reaching importance, affecting every large industrial plant in the United States where the railroads perform the switching of cars to and from points of loading and unloading, and affecting the railroads serving those plants, whether this Court intended the language quoted from its opinion to have the effect given to it by the Commission and the District Court. It is also a serious question whether, when an order of the Commission has been upheld by this Court on a particular record, a matter of fact as to which the Commission's determination on the evidence then before it becomes, in effect, a matter of law which cannot be challenged by other proof in later proceedings. The matter is particularly serious because if the proof offered by appellant in the proceeding before the Commission was correct, as appellant believes that it was, affirmance of the decision of the District Court would embalm for all time as a basic fact that which is in truth contrary to the facts.

The matter can be stated in a somewhat different way. It is, of course, recognized, as held by the Supreme Court in the *Staley* case, *United States* v. *Wabash R. Co.*, 321 U. S. 403, that the fact that one industry is receiving a service not compensated by the railroads' line-haul rates and contrary to their tariffs and to Section 6 of the Act constitutes no justification for not enforcing the Act with respect to another industry. This merely means that the Commission should also proceed in due course against the former. It is, however, a far different matter to conclude

that where the railroads perform a like or greater service for every industry paying the same freight rates in a large terminal area, in which are located thousands of industries, this fact may not be shown for the purpose of indicating the nature and extent of the services for which the line-haul rates provide compensation and the usual custom and practice of the railroads as to what constitutes delivery under the particular rates involved. Whether the Supreme Court's decisions are properly to be construed as so holding is a question which must be of great importance to industries and railroads generally.

If the evidence which appellant and the railroads sought to present in this proceeding in fact is true (and it has not been suggested that it is not), it is apparent that the Commission itself in holding and proceeding upon the view expressed by its counsel to the District Court that "the service rendered plaintiff constitutes a discrimination as being a service not accorded shippers generally" has been misinformed and has refused to correct its information. It is likewise to be inferred that the Supreme Court, in quoting similar language from the Commission's report in the *Staley* case in its opinion in *United States* v. *Wabash R. Co.*, was given an erroneous view of the real facts. Although in the *Tin Plate* case the Supreme Court said, on the evidence then before it, that "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service," it did *not* hold that there was a custom or practice which has the force of a rule of law that the line-haul rate does *not* include plant spotting service when performed by the railroads. It is submitted that the Court's opinion left the matter as a question of fact to be the subject of proof in any proceeding where the question is material. But whether or not that is the correct inter-

pretation of the Supreme Court's decisions is a question of substance whose answer will have a far reaching effect. Certainly, precedent should not be used to perpetuate factual error.

5. Following the conclusion of the hearings before the Commission, the railroads filed with the Commission a terminal tariff specifying and defining the circumstances in which a charge would be made in connection with the switching of cars at an industry. This tariff by its terms was applicable at appellant's plant. Appellant contended before the Commission that because the tariff by its terms specified and defined the circumstances under which charges in addition to the line-haul rates should be made and provided, in effect, that no charge would be made in addition to the line-haul rates except under the defined circumstances, the taking effect of the tariff rendered the proceeding before the Commission moot. It was contended that the only issue then became whether the provisions of the tariff were just and reasonable and that this was not a subject of the particular investigation. The Commission ruled that the tariff was applicable at appellant's plant but that since it did not provide for additional switching charges in the circumstances in which the Commission in its report found that such additional charges should be assessed, the tariff was ineffective. This ruling was upheld by the District Court.

As made clear in Commissioner Alldredge's dissenting report, it has always heretofore been the law that a tariff which has been filed with the Commission and has gone into effect has the force of a statute, is binding upon the parties and determines rates and charges to be collected, and that charges must be collected only in accordance with that tariff until it is changed, whether or not the charges are claimed

to be unjust and unreasonable. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516. There is raised here the question whether this legal doctrine is still valid or whether a tariff while on file with the Commission and by its terms applicable is to be disregarded if its provisions are contrary to the views of a majority of the Commission. This is a question which concerns all carriers and shippers of freight.

For these reasons it is submitted that the issues involved are substantial and merit consideration of the appeal by the Supreme Court.

F. The Opinion Below

The District Court rendered no opinion in entering its judgment and decree. It did, however, make findings of fact and conclusions of law. A copy of its decree, including its findings and conclusions is appended hereto as Appendix A-1. In denying appellant's motion to set aside the findings of fact, conclusions of law and decree the Court submitted a memorandum by Judge Campbell of which a copy is appended hereto as Appendix A-2.

Copies of the reports of the Commission, the findings and conclusions in which are here challenged, are appended hereto appendices B and C.

The so-called basic decision of the Commission in its general investigation is reported in 209 I. C. C. 11.

Prayer for Reversal

WHEREFORE appellant prays that its appeal may be heard and that the judgment, decree and order of the District Court may be reversed.

Respectfully submitted,

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APPENDIX A-1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 46C1604

CORN PRODUCTS REFINING COMPANY, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Findings of Fact and Conclusions of Law

The above action came on for hearing on November 5, 1946, before a duly constituted three-judge statutory court, sitting in the United States District Court at Chicago, Illinois. Counsel for plaintiff, defendant, and intervening defendant were present, and the cause was submitted upon the pleadings, the certified transcript of the record of proceedings before the Commission introduced by plaintiff, and oral argument and briefs. The Court, being fully advised in the premises, enters the following as its findings of fact and conclusions of law:

Findings of Fact

1. This suit was brought to set aside and annul an order of the Interstate Commerce Commission dated July 1, 1946 entered pursuant to the Seventy-Fourth Supplemental Report of the Commission in a proceeding entitled *Ex Parte 104, Corn Products Refining Company Terminal Service, Practice of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* Said order prohibits four railroads therein named from performing within plaintiff's plant at Argo, Illinois, without charge in addition to their line-haul rates certain spotting and switching services, in connection with traffic transported by said carriers in line-haul service to and from said plant, the Commission having found that such services are a plant service for the convenience of the industry and the assumption of such

services by the railroads without charge in addition to their line-haul rates results in a violation of Section 6 (7) of the Interstate Commerce Act.

2. This seventy-fourth supplemental proceeding arose out of said *Ex Parte 104* basic proceeding instituted by the Interstate Commerce Commission of its own motion on July 6, 1931, in which the Commission entered its basic report on May 14, 1935 (209 I. C. C. 11). No orders of the Commission were made upon the footing of this basic report.

3. The Commission's Seventy-Fourth Supplemental Report, including both its report of April 2, 1945 and its report of July 1, 1946 on further hearing, together with the certified transcript of evidence of record before the Commission, show that the plaintiff, Corn Products Refining Company, operates an extensive industrial plant at Argo, Illinois, at which it produces numerous products from corn which are used for food and industrial purposes. Its plant covers a considerable area, approximately 200 acres, and various portions thereof are served by an extensive network of tracks covering in the aggregate about 23½ miles. These tracks afford connections by the railroads serving the plant with the numerous buildings and elevators within the plant. The manner of the interchange of cars between the plant and the trunk lines of said railroads and also the practices of the carriers in connection with the spotting and switching services within the plant area are set out in detail in the Commission's reports aforesaid of April 2, 1945 and July 1, 1946, to which reference is herein made.

4. The Commission also had before it the complete record of its proceedings which formed the basis of its primary report of May 14, 1935 (209 I. C. C. 11), which report and supporting record set out in detail the custom and practices of railroads throughout the country in connection with spotting and switching services at industrial plants. *This complete record is not before this Court.* The Commission said in its main report (209 I. C. C. 11, 43):

> Involved in this proceeding are approximately 200 industrial plants where spotting allowances are paid;

and also numerous plants at which respondents [railroads] assign locomotives to perform spotting service beyond the points of interchange. In either case a second placement of cars is made * * *.

The partial record produced by plaintiff before this Court does not contain the evidence of record as to the practice and custom at these plants. Accordingly, the whole of the record on which the Commission acted and made its findings was not produced by plaintiff for consideration by this Court. However, the entire record which formed the basis of the Commission's finding in its basic report (209 I. C. C. 11) has been reviewed and passed upon by the Supreme Court of the United States, which Court has determined that such record contains "voluminous evidence" (301 U. S. at 404) which supported the findings and conclusions contained in the Commission's aforesaid report, and that "there is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

5. The Commission had before it substantial evidence to support the findings of fact contained in its reports of April 2, 1945, and July 1, 1946. Said findings are herein adopted by this Court.

Conclusions of Law

The Court makes the following conclusions of law:

1. This Court has jurisdiction of this cause and of the parties thereto.

2. Section 6 (7) of the Interstate Commerce Act prohibits the transportation of property except in conformity with published tariffs and also provides that no carrier shall refund or remit in any manner or by any device any portion of the rates, fares, and charges specified in the tariffs. This section prohibits such transportation whether or not any discrimination between shippers results. The form which a rebate takes is of no consequence, whether it be by way of an allowance by the railroads to shipper for the performance of spotting services found to be beyond the

transportation obligation of such carriers under their line-haul rates, or by way of rendition of the spotting services by the carriers without charge in addition to their line-haul rates (*United States* v. *Wabash R. Co.*, 321 U. S. 403 at 410).

3. When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, any service beyond the point of plant interruption or interference is in excess of the carrier's transportation obligation, and assumption by the carrier of the service beyond such points of interruption or interference is unlawful and violates Section 6 (7) of the Interstate Commerce Act. Carriers cannot be called upon to make delivery through a network of plant switching tracks. Their transportation obligation as common carriers involves only a delivery and acceptance at some reasonably convenient point of interchange. The controlling question is always whether the movement from the designated points of interchange to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding.

4. The point in time and space at which the carriers' transportation service ends is a question of fact to be determined by the Commission and not the courts, and its findings on that question will not be disturbed by the courts if supported by evidence.

5. In determining the question of where transportation obligations begin and end with respect to plaintiff's Argo plant, the Commission properly applied the standards set forth in its basic report of May 14, 1935 (209 I. C. C. 11) to the physical conditions existing at plaintiff's plant.

6. It is settled law that the findings of fact as stated by the Commission in its reports of April 2, 1945 and July 1,

1946 may not be assailed and must be accepted by the courts in the absence of the entire record upon which they were made. (*Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286; *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 122, 125; *Louisville & Nashville R. Co.* v. *United States*, 245 U. S. 463, 466; *Louisiana & P. B. Ry. Co.* v. *United States*, 257 U. S. 114, 116; *Jagg Bros.* v. *United States*, 280 U. S. 420, 443).

7. The Commission was not required to receive evidence of the custom or practice at other plants in the Chicago area or elsewhere in the United States either for the purpose of indicating discrimination (*United States* v. *Wabash R. Co.*, 321 U. S. 403, 410-413), or for the purpose of showing practice and custom or extent of service rendered to shippers generally, or for any other purpose. In this latter connection, the Commission was clearly warranted in accepting as conclusive the finding of the Supreme Court upon review of its record of investigation and its basic report of May 14, 1935, that "there is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service." (*United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U. S. 402, 410). Efforts by plaintiff to introduce evidence for the alleged purpose of proving the contrary were properly rejected by the Commission, and its action in so doing was not arbitrary. The exclusion of such evidence by the Commission was not motivated simply in the interest of saving time or expense in this proceeding or similar proceedings which will follow it, although it is incumbent upon an administrative body not to allow records to be encumbered with evidence addressed to issues which have been thoroughly investigated by the Commission and on which its findings and conclusions have been upheld on final review by the courts. It is axiomatic that a litigant cannot insist that the Commission may not take a second step in its administrative process without retracing all previous ones on which its actions have been reviewed and passed upon in such manner as to constitute settled law. Assuming for purposes of argument that the evidence tendered by plain-

tiff on this point had been received, and further assuming that it would have shown what plaintiff contends, such showing still would be at variance with the Supreme Court's finding based upon its review of a record described by that Court as containing "voluminous evidence" to support the Commission's conclusions in its basic report with respect to the practice and custom of railroads in rendering spotting services to shippers generally. (301 U. S. at 404.) In so finding it is perfectly clear that the Supreme Court was not referring only to plants where allowances were paid as distinguished from plants where similar to plaintiff's situation, the carriers performed the spotting service. The Supreme Court stated (301 U. S. at 404): "The Commission's report summarized its conclusions based on evidence as to conditions at approximately two hundred industrial plants where spotting allowances were paid by the carriers *and numerous plants where such services were performed by the carrier.*" [Italics supplied.] Under such circumstances, the Commission's exclusion of evidence offered by plaintiff cannot be viewed as arbitrary or as denying plaintiff a fair hearing. Moreover, the identical contention now advanced by plaintiff was raised by appellant in its brief before the Supreme Court in the last of these terminal switching cases to be reviewed by that Court (*Hanna Furnace Corporation* v. *United States, et al.*, 323 U. S. 667 (1944). At page 20 of Appellant's brief (Records & Briefs, U. S. Supreme Court, Vol. 83, Oct. Term. 1944) the following appears:

> The appellant contends that a finding by the Commission that the spotting in its plant exceeds the service rendered by the railroads in spotting cars on team-tracks and industrial spur tracks, without receiving evidence and determining the extent and relative cost of spotting service on team-tracks, especially in the Buffalo switching district, is wholly arbitrary and without legal basis. The District Court has answered this contention by stating that it is unnecessary to determine the extent of service required

> in team-track spotting because the Commission has determined "what is in excess of team-track spotting." This, it is submitted, is a contradiction in terms. Without knowing the size and extent of the standard to be used as a comparison there can be no such thing as a determination of what exceeds the standard.

As pointed out by the United States in its Brief filed with this Court (p. 22, footnote 16), the Supreme Court not only rejected the foregoing contention but did so by granting a motion to affirm filed by the Government on the ground that the contentions raised by appellant were so unsubstantial as not to warrant argument.

8. The Commission's conclusions that the so-called "Raasch-Jones" tariffs were inapplicable to the issues under consideration in this proceeding and did not and could not supplant or supersede *Ex Parte 104* proceedings were correct and are hereby adopted.

9. There is sufficient substantial evidence to support the Commission's finding that the carriers' transportation service was complete upon delivery of cars to the interchange tracks and that spotting within plaintiff's plant is not included in the service for which the line-haul rates were fixed.

10. The credibility of witnesses and the weight of evidence are for the Commission and not for the courts. The value and weight of the evidence given by plant and railroad executives with respect to alleged changes in its plant operations and the effect thereof on the basic plant switching operations and the inferences to be drawn therefrom were for the Commission to determine.

11. The Commission's order of July 1, 1946 is predicated upon substantial evidence, is in accordance with applicable law, and is valid in all respects.

12. The petition herein is without merit and should be dismissed for want of equity at the cost of plaintiff, and

the interlocutory injunction heretofore granted should be vacated.

Enter December 5, 1946.

(Sgd.) Otto Kerner,
United States Circuit Judge;
(Sgd.) William J. Campell,
United States District Judge;
(Sgd.) Walter J. La Buy,
United States District Judge.

APPENDIX A-2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 46C1604

Corn Products Refining Company, *Plaintiff,*

v.

United States of America and Interstate Commerce Commission, *Defendants*

Final Decree

This cause coming on for hearing before the undersigned, sitting as a duly constituted District Court of three judges, as required by law, full hearings having been had, and the Court having filed its findings of fact and conclusions of law, and in accordance therewith, all facts considered, the Court being of opinion and finding that the Commission's order, dated July 1, 1946, is valid and lawful in all respects, it is

Ordered, Adjudged, and Decreed, that the relief prayed for by plaintiff is hereby denied and the suit is dismissed, plaintiff to pay the costs,

And It Is Further Ordered, Adjudged, and Decreed, that the interlocutory injunction heretofore granted on October

10, 1946, be and the same hereby is, dissolved, to the extent that the operation and enforcement of the Commission's order of July 1, 1946, is enjoined and restrained thereby.

Dated this 5th day of December, 1946.

(Sgd.) Otto Kerner,
United States Circuit Judge;
(Sgd.) William J. Campell,
United States District Judge;
(Sgd.) Walter J. La Buy,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 46 C 1604

Corn Products Refining Company, *Plaintiff,*

vs.

United States of America and Interstate Commerce Commission, *Defendants*

Memorandum

Before Kerner, Circuit Judge; Campbell and La Buy, District Judges.

Campbell, *District Judge:*

The plaintiff has filed a motion to set aside the court's findings of fact, conclusions of law, and decree entered in this cause on December 5, 1946, and to grant the plaintiff a new trial.

This action was brought to enjoin the enforcement of an order of the Interstate Commerce Commission which defined and limited the point at which the carriers' transpor-

tation duty ended and beyond which the carriers could not move cars in making deliveries at plaintiff's plant at Argo, Illinois, unless they made a charge in addition to the line-haul rate. The plaintiff argued that it was denied a proper hearing because the Commission excluded certain proffered evidence. That evidence pertained to practices of carriers generally throughout the country and in the Chicago area, in making deliveries of cars in similar and other industries, and was excluded by the Commission on the ground that in this type of proceeding comparisons with other situations are irrelevant. This offer of evidence was the result of plaintiff's apparent misconception of the Commission's duty and of the rules applicable in this type of proceeding.

In Ex Parte 104, 209 I. C. C. 11 (1935), the Commission made an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. It decided that, in determining the point at which the carriers' transportation duty ends, the standard to be applied is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or is a part of the carrier service comparable to the usual car delivery at a team track or siding. In applying this standard in particular cases, the Commission determined that when a carrier is prevented from performing an uninterrupted service to the points of loading or unloading within the confines of an industrial plant because of some action or disability of the industry or its plant, the carrier's duty with respect to the delivery or receipt of cars does not extend beyond the point of interruption or interference; and that where delivery and receipt of freight is effected by carriers on interchange tracks because of interruption or interference with the work of the carrier and the industry which would be encountered beyond such tracks, delivery or receipt on such tracks constitutes delivery or receipt under the line-haul rates.

Plaintiff's counsel has stated his conception of the Commission's test in determining whether or not the service within a plant is included within the line-haul rates to be "whether the service is, in the first place, customary, • • •

whether it is reasonable and whether it is in excess of what the Commission has called simple switching or team track delivery". (Plaintiff's Brief in Support of Petition for Permanent Injunction, p. 95). On the basis of this belief that evidence of the customary practices of carriers in making delivery of cars to industrial plants is relevant in determining the extent of their legal duty to deliver at a particular plant, plaintiff sought to introduce before the Commission the aforesaid evidence, which was rejected by the Commission as irrelevant.

A review of the authorities will make plaintiff's misconception apparent.

On page 6 of the Plaintiff's Brief above mentioned appears a quotation from the original report in Ex Parte 104 (209 I. C. C. 11, 18): "We come then to the test, which vague as it is, is the only safe one, that is, whether in the light of all the circumstances such a form of delivery is customary or reasonable." The Commission continued, in the following sentence which the plaintiff did not quote: "That it is not customary is established, we think, by uncontroverted evidence." At this point in its report the Commission was considering the insistence of many industries that the carriers haul cars beyond the interchange tracks, which correspond to ordinary spurs or sidings, over an intricate system of plant trackage and distribute the cars among the mills and warehouses in order to meet the industrial needs of the plant. The Commission was thus considering the same demand which the plaintiff made in this proceeding, and determined, on the basis of a nation-wide review of carriers' practices, that such delivery was not customary.

In U. S. v. American Sheet & Tin Plate Co., 301 U. S. 402 (1937), the Supreme Court reviewed the record before the Commission in Ex Parte 104. The Court declared, with reference to the performance by carriers of spotting service on plant trackage as part of the carrier's customary duty under the line-haul rate: "The record fails to establish any such custom." 301 U. S. 402, 410, cited in Plaintiff's Brief in Support of Petition for Permanent Injunction, p. 43. The plaintiff assumes that this statement is a negative finding by the Court that there was a lack of evidence in the

record concerning the customary performance by carriers of spotting services without additional charge, and therefore argues that its offer of such evidence should have been accepted to show the existence of such custom. But the Court went on, in the Tin Plate case, to discuss the Commission's record and indicated that the record showed positively the lack of a nation-wide custom with reference to spotting cars on plant trackage, and said, at p. 410: "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

In U. S. v. Wabash Railroad Co., 321 U. S. 403 (1944), the type of evidence excluded here was admitted by the Commission, and was relied on by the District Court in setting aside the Commission's order on the ground that there was lack of evidence to support the Commission's finding of a "preferential service not accorded to shippers generally" and that the order discriminated against the plant. The Supreme Court, stating that this was a mistaken interpretation of the Commission's findings and misapprehended their legal effort, said, at p. 412:

> "If the Commission's reference, in its conclusion of law, to 'a preferential service not accorded to shippers generally' means more than the statement in the fifth finding of fact that the service is 'in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks,' it is obviously irrelevant to the present proceeding. * * * But a reading of the Commission's report and findings makes abundantly clear that it was not concerned with discriminations or preferences between the Staley plant and others, such as are prohibited by sections 2 and 3(1); that the 'preference' to which it referred was not based upon a comparison of conditions at the Staley plant with those of others, but upon an application to the actual conditions at the Staley plant of the standards laid down in its report in Ex parte 104, in order to ascertain whether the service rendered there is in excess of that which the carriers are obliged to perform by their tariffs."

Thus evidence of comparison with other plants was used in the Staley case to attack the Commission's order in the District Court on the ground that it discriminated against Staley. But the Supreme Court indicated that a Commission order on the subject of spotting services by carriers, intended to prohibit the granting of preferences or rebates by carriers either by their performance of spotting services under the line-haul rate or by paying an allowance to plants performing their own spotting, could not be attacked on the ground of discrimination against the particular plant under investigation, because the situation at each plant must be judged by the particular conditions found to exist there. And if it could be said that precisely the same conditions exist at two plants, the fact that the Commission has acted with reference to one of them is not a discrimination against it, but shows the necessity of further action by the Commission to suppress unlawful practices elsewhere. 321 U. S. 403, 412-13.

It thus appears that even if plaintiff's proffered evidence of practices at other plants and in other switching areas had been admitted by the Commission, the order of the Commission would nonetheless have to be upheld as a result of its study of the actual conditions prevailing at the Corn Products plant, because the Commission's duty is to apply the standards laid down in its original report in Ex Parte 104 to the facts found to exist at any particular plant. If Plaintiff's proffered evidence was intended to show what services were accorded to shippers generally, it was clearly irrelevant because, as the Supreme Court said in the quotation given above from the Staley case, the standard of comparison is not the extent of spotting services given by carriers at other plants, which may merely represent other instances of unlawful rebates or preferences, but is the extent of services "rendered shippers generally in the receipt and delivery of traffic at team tracks". Traditionally delivery at team tracks or sidings has been regarded as part of the carrier's transportation duty under the line-haul rate, and it is such delivery which was the origin of the practice of spotting. 209 I. C. C. 11, 17, 32. As industrial plants become complex, with hundreds of acres and miles of track inside the plant area, it is a question of fact for the Commis-

sion to determine at what point the movement of cars at any particular plant becomes a service for the convenience of the industry, and is not part of the carrier's duty to deliver, equivalent to placement of cars on a simple siding or team track.

The other purpose for which plaintiff appears to have intended its proffered evidence was to show that the standards established by the Commission in Ex Parte 104 were erroneous because established on the basis of an inadequate investigation of the practice with reference to spotting services. While an administrative agency should not impose rules based on an inadequate investigation of a problem, it should also, in a case of this sort, not be compelled to re-litigate the basic issues in each supplementary proceeding brought to enforce the rules in situations where violations are found to occur. If this were a case of first impression, this court would be inclined to scrutinize the record in the original proceeding and the evidence which the plaintiff wishes to introduce. But because of the fact that the Supreme Court has already reviewed the Commission's report and has approved the standards established therein, this court must hold that the original extensive investigation by the Commission of the problem of spotting services was fair and that the standards determined therein were based upon sufficient evidence, and that the Commission's duty in each supplementary proceeding is merely to apply the aforesaid standards to the traffic conditions found to exist at any particular plant where spotting services are involved.

On the basis of the foregoing considerations, this court entered findings of fact, conclusions of law, and a decree dismissing the petition. Plaintiff's present motion is based upon certain findings and conclusions which refer to the incompleteness of the record before the court. It asks either that it be given an opportunity to introduce the missing parts of the record, if the record is incomplete, or that the findings and conclusions be corrected to state that the complete record is before the court.

The fourth finding of fact states that the Commission had before it the complete record which formed the basis for its original report in Ex Parte 104, that this record is not before the court, that the "partial record produced

by plaintiff before this court does not contain the evidence of record as to the practice and custom at these (other) plants", and that "accordingly, the whole of the record on which the Commission acted and made its findings was not produced by plaintiff for consideration by this Court."

The practice and custom at other plants was relevant in the original proceeding when the Commission was attempting to learn if there was a universal custom with reference to spotting services. With the Commission's finding, approved by the Supreme Court, that no such custom existed, evidence of comparative practices became irrelevant in supplementary proceedings. It might be argued that since this proceeding is supplementary to the original proceeding in Ex Parte 104, record herein is, in a sense, "partial", since the court does not have before it the record on which the Commission determined the applicable standards as set forth in its original report. However, even if the record were "complete" in the sense that all the evidence in the original proceeding had been introduced, this court does not have the power to reach a conclusion opposite to that of the Supreme Court in the previously mentioned cases concerning the standards to be applied in determining where the carriers' transportation duty ends. It would therefore have been a futile gesture to have introduced herein the record in the original proceeding. It seems clear that since each supplementary proceeding involves merely the application of the standards established in the original proceeding to the physical facts found at the plant under investigation, and since the standards to be applied have already been determined by the Commission and approved by the Supreme Court, the record in each supplementary proceeding is essentially complete in itself. No other meaning was intended by the fourth finding of fact.

The sixth conclusion of law states that the findings of fact made by the Commission in its reports in this case "may not be assailed and must be accepted by the courts in the absence of the entire record upon which they were made." This conclusion is related to the fourth finding and means that since this proceeding is supplemental to the original proceeding in Ex Parte 104 and involves an application of the standards determined in the original

proceedings, this court cannot review the record in which the standards were determined by the Commission because it is not before the court. But as has already been shown, this court could not review the latter record even if it were before the court because the Supreme Court has already done so. Nothing in this conclusion of law means that the record in the supplemental proceeding involving the plaintiff's plant is incomplete.

The seventh conclusion of law states that the Commission was not required to receive evidence of comparative practices elsewhere either for the purpose of showing discrimination, or practice and custom or extent of service rendered shippers generally, or for any other purpose, because the Supreme Court has already reviewed the record in the original proceeding and has found that there is no custom or practice that the line-haul rate includes plant spotting service. In adopting this conclusion of law, the court agreed with the defendants' interpretation of the Tin Plate case, which has been previously discussed herein, and disagreed with the plaintiff's argument that it is not clear from a reading of the Tin Plate case the extent of the record that the Supreme Court was reviewing in that case.

The findings and conclusions heretofore made in this cause as they are now explained in this memorandum, are hereby confirmed. The record heretofore introduced herein by the plaintiff is deemed complete for the purposes of this trial. The plaintiff's motion to set aside the decree, findings and conclusions, and to grant plaintiff a new trial, is therefore denied.

APPENDICES B and C

Appendix B

Interstate Commerce Commission

Corn Products Refining Company

Ex Parte 104

Practices of Carriers Affecting Operating Revenues or Expenses

Part II, Terminal Services

Submitted March 1, 1945 Decided April 2, 1945

Respondents' line-haul rates found not to include services beyond the interchange tracks described in the report, and the performance by respondents of services beyond those points without compensation in addition to the line-haul rates found to be in violation of section 6(7) of the Interstate Commerce Act.

Guernsey Orcutt, Edward A. Kaier, J. R. Barse, Samuel Kassel, Elmer A. Smith, William B. Browder, H. G. Powell, Charles Naffziger, L. H. Strasser, A. W. Richardson, and E. W. Lademan for respondents.

C. L. Bruno, Kenneth F. Burgess, H. T. Newcomb, Douglas F. Smith, Parker McCollester, R. R. Sebury, I. M. Peters, Jasper Giovanna, C. D. Miller, and J. F. Adams for interested party and other industries.

John S. Burchmore for National Industrial Traffic League.

Allen Crenshaw and Dwight H. Williams for Interstate Commerce Commission.

Seventy-Fourth Supplemental Report of the Commission

Patterson, *Commissioner:*

Exceptions were filed by Corn Products Refining Company to the report proposed by the examiners and we have heard oral argument.

In the original report, *Propriety of Operating Practices —Terminal Services,* 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to industries for performing spotting services at industrial plants and concerning performance of such service by respondent rail carriers. This supplemental report deals with the lawfulness of terminal services performed by the Belt Railway Company of Chicago, hereinafter referred to as the Chicago Belt, at the plant of the Corn Products Refining Company at Argo, Ill.

The Corn Products Refining Company manufactures various products from corn. Its plant at Argo is within the Chicago, Ill. switching district adjacent to the western boundary and about midway between the northern and southern boundaries of that district and about 20 miles southwest of the business center of Chicago. The plant site contains approximately 200 acres and is irregular in shape.

The tracks within the plant connect directly with those of the Chicago Belt, the Indiana Harbor Belt Railroad Company and the Alton Railroad Company.[1] Traffic for the Baltimore and Ohio Chicago Terminal Railroad Company is handled by the Alton. The other truck-line rail carriers entering Chicago absorb the switching charges of one of the three named carriers that reach the plant with their own tracks.

The Chicago Belt enters the plant from the east by an underpass under Archer Avenue. It has a single track branch line approximately 1.5 miles long, which runs west from its Clearing Yard to the plant. The Clearing Yard has a capacity of 10,000 cars and most of the trunk lines entering Chicago deliver and receive freight there. All traffic handled by the Chicago Belt to and from the plant moves through that yard.

The Indiana Harbor has a 9 track yard with a capacity of 250 cars along the northeastern border of the plant, reached by a short branch from the main line. A single-track line runs from that yard across Archer Avenue to

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[1] For convenience the last two named carriers will be referred to respectively as the Indiana Harbor and the Alton.

the plant, which it enters through a gate about 500 feet north of where the Chicago Belt enters the plant.

The Alton's main double-track line runs along the western border of the plant. Between it and the plant are two side tracks from which a single lead track enters the plant through a gate at the southwestern corner. About 275 or 300 feet east of the gate the lead track connects with the western end of a plant yard hereinafter described.

The principal lead track from the Chicago Belt's line after entering the plant branches into four tracks, hereinafter referred to, from north to south, as leads C, D, E, and F, respectively, which in turn branch into other tracks. One track branching off lead E, hereinafter referred to as track 1, extends approximately 4,700 feet to the western boundary of the plant near where the Alton enters. That track for approximately 2,075 feet from the western boundary is a ladder track, connecting the west ends of 13 parallel yard tracks, and the north yard track. For the remainder of the distance it is an open running track that does not serve any loading or unloading point. The 13 yard tracks, each of which will hold approximately 20 cars, are also connected on the east by another ladder track. Those 13 tracks are within the plant and are herein referred to collectively as the plant yard. Two other tracks, both north of track 1, diverge from lead E about 500 and 700 feet, respectively, west of Archer Avenue. The northern one is a stub-end track which serves building 43 on the south. The other is parallel to track 1 from the point of divergence nearly to the east end of the plant yard at which point there is a crossover from track 1. At that point it begins to loop northward to a point about 80 feet north of track 1 and then in a reverse curve joins track 1 again near the western end of the plant yard. That track is hereinafter referred to as track 1-A. There is another loop hereinafter referred to as track 1-B that takes off of and joins track 1-A. It reaches a point approximately 100 feet north of track 1-A and serves as a link between a number of other plant tracks.

Lead D diverges into two stub tracks. The northern one serves the south side of buildings 13, 15, 16, and 17 and the other, the north side of building 43.

Lead C diverges into two tracks. The northern one connects with one of the three tracks serving the corn elevator. The other connects with the same track by means of a crossover but continues west merging into track 1-B. It runs along the north side of a number of corn tanks and buildings 15, 16, 17, 65, 53, 74, and 48 and is the only track that affords access to the northern sides of those buildings.

Lead F diverges into two tracks about 300 feet apart that run through to the plant yard and two stub-end tracks between those through tracks. The northern through track serves buildings 27, 29, 88, 47 and 47-A on the south. There is another track that takes off of and joins that track at points 175 to 225 feet respectively, east and west of those buildings. It might well serve for a run around track but it also serves the north sides of buildings 25, 31, 39, 40 and 28. The use of those tracks as through tracks, however, is prevented by a permanent bridge between buildings 29 and 80 which prevents switching at the north sides of buildings 25, 31 and part of building 39 and the south sides of buildings 27 and 29 from the west and the north sides of buildings 48 and 39 and the south sides of buildings 88, 47, and 47-A from the east. Switching of those tracks from the west is also impeded by a removable bridge near the west ends of buildings 47-A and 40. Before engines can pass, that bridge must be moved. Moving of this bridge is permitted only under the supervision of a designated plant employee who requires six assistants. The other through track that diverges from lead F serves buildings 32, 38, 42 and 28 on the south. There is a run around on that track for a distance of approximately 650 feet opposite buildings 32 and 38 and a portion of building 42 and a reverse stub end track that serves building 28. The two stub end tracks that branch from lead F run between buildings served by the other tracks that diverge from that lead. There are two removable bridges over those tracks. One between buildings 40 and 42 does not interfere with switching, as the tracks west of the bridge are not used. The other, between buildings 39 and 42, must be moved in order to serve building 40 and part of building 39 on the south and part of building 42 on the north.

The removal mechanism of the latter bridge is kept locked. The key is in the custody of a plant employee who works in an adjacent building. Six men are required to move that bridge. The engine was required to wait for ten minutes on August 10 and eight minutes on August 12, 1943, for the removal of the bridge between buildings 39 and 42 and seven minutes on August 11, 1943, for the removal of the bridge between buildings 47 and 48. These interferences were noted within a period of 5 days.

The Indiana Harbor's principal lead track diverges into two tracks hereinafter referred to as leads G and H, which, in connection with other plant tracks, afford several means of reaching the plant yard. Lead H, the southern one, runs about due west until it connects with a track hereinafter described as track 2. A stub end and a switch track connected at both ends diverge therefrom. The stub end track serves building 3 on the south and the switch track serves a straight track stubbed at both ends which extends along the southern sides of buildings 59, 10, and 4. Lead G is the most northern track in the plant, except for a stub end track diverging northward therefrom and serving building 98. Lead G runs along the northern side of buildings 70, 48, 4-A and 60 as a double track for about 1,450 to 1,500 feet, from which point one branch continues due west as a single track until it joins another single track that runs along the entire western border of the plant. The latter serves as a ladder track for other plant tracks and joins the Alton's lead track to the plant yard. Those two tracks are hereinafter referred to, respectively, as the northern boundary and western boundary tracks. The other branch from the point west of building 60 continues as a double track in a left curve for approximately 500 feet, thence as a single track for approximately 825 feet to the peak of track 1-B. That single-line track, hereinafter referred to as track 2, together with part of track 1-B constitutes the main artery of the plant's system of tracks. Most loading, unloading and hold points in the plant, except as hereinbefore noted, are served by stub end tracks diverging from one or the other of those tracks.

West of that artery are four tracks that branch off of track 1-B and connect with the western boundary track

near the Alton's lead track and a short stub end reverse track that abuts the southern end of a shop owned and operated by the Crystal Car Line Express, which is a wholly-owned subsidiary of the Corn Products Refining Co. The northern one of those tracks passes through the shop and the others in proximity thereto. About 100 feet farther north and approximately parallel thereto and to each other are two stub end tracks about 16 feet apart and 1,000 or 1,100 feet long. They diverge from track 2 and extend nearly to the western border track. Approximately 350 or 375 feet northeast of the point where the latter tracks take off of track 2 there is another switch westward which almost immediately branches into two tracks. The coal dock is on the southern one of those tracks. Each of them in turn branches into double stub end tracks. There is also a short stub end track that diverges from the track on which the coal dock is located. About 350 or 375 feet farther northeast a single-line track diverges westward, passes through building 41 and then extends for about 260 feet beyond that building. The only other track west of track 2 is the short stub end track serving building 98.

Practically all of the buildings and nearly all of the loading and unloading points in the plant north of track 1 are east of tracks 1-B and 2. The only exceptions shown on the plat of the plant are buildings 41, 98 and a "Belt Oil Storage" building and the Crystal Car Line facilities.

Starting from the south, in addition to the tracks heretofore described there are two parallel stub-end tracks that diverge eastward from track 1-B that serve buildings 45, 46 and 51 on the south and buildings 19 and 23 on the west. Two other parallel stub tracks, about 190 feet north of the two just referred to, serve the same buildings on the north and buildings 48, 74, and 56 on the south. All four of those tracks are between track 1 and the track that runs from lead C to track 2. A single track takes off of the track from lead C to track 2 at a point about 175 feet from where it joins track 2. That single track at a point about 250 feet east of the point of switch diverges into three parallel stub end tracks, hereinafter referred to as the elevator tracks, which extend practically to the

eastern border of the plant. The corn elevator, which is the principal unloading point in the plant, is about 800 feet from the east end of those tracks. At that point there is a track scale on each track with passing tracks. The northern elevator track also serves buildings 3, 9, 22, 11 and 21 on the south. North of the elevator tracks are three stub-end tracks which diverge from a switch from the lead to the elevator tracks and which serve the "tank car stripping house." A short distance farther north are two more short stub-end tracks, one of which serves building 24, the paint shop and syrup storage tanks.

Between the northern boundary track and the other track that runs westward from lead H there is a plant yard adjacent to track 1 known as the syrup yard which consists of 11 stub-end tracks. Those 11 tracks diverge from two switches which take off of track 2. The stub ends of 10 of them abut buildings 68 and 6 and the other one runs along the south side of building 6.

There are about 23.5 miles of track within the plant. In a space of approximately 540 feet on track 2 there are four switches to the east diverging into 21 tracks and two switches to the west diverging into seven tracks.

One Diesel and two steam engines perform the switching services within the plant. The Diesel engine is constantly within the plant and operates 24 hours a day with three crews, each working an 8-hour shift. The crew of one steam engine reports for work at 7.30 a.m., and works until 4 p.m. The crew of the other steam engine reports for work at 2:45 p.m., and works until it completes the switching at the plant. The steam engines are housed at the Clearing Yard. In going to and returning from the plant they may haul a train of cars. Except for the time required to make up the trains in the Clearing Yard and that required for travel between the Clearing Yard and the plant, the steam engines work the entire shifts within the plant. The three engines are owned and the crews employed by the Chicago Belt, but a contract between that carrier, the Indiana Harbor, Alton, and Baltimore and Ohio Chicago Terminal provides that the engines while at the plant shall be subject at all times to the supervision of the yardmaster of the Corn Products Refining Com-

pany. A representative of the railroads testified November 11, 1931, that neither the railroad nor conductor has any knowledge when a train leaves the Clearing Yard, of when or where the cars are to be spotted in the plant; that the yardmaster employed by the Corn Products Refining Company "has charge of the crews and directs them what to do" and that "he has the privilege of telling those engine crews when they are in the plant to do any work he sees fit." At the last hearing a representative of the carrier affirmed that testimony. The traffic manager of the Corn Products Refining Company testified September 30, 1932, that the three railroads bring the traffic to the plant and that it is distributed within the plant by the Chicago Belt on orders and instructions received from the yardmaster from time to time throughout the day in accordance with the requirements and desires of the industry. This was not contradicted at the last hearing. The conclusion is that the yardmaster and his two assistants employed by the industry have exclusive control over all switching operations in the plant and determine when, where, and how, all cars shall be placed.

All cars loaded and empty brought into the plant by the Chicago Belt and Alton are first placed on tracks in the plant yard. The Indiana Harbor delivers cars both loaded and empty on either of the tracks running westward from leads G and H as the yardmaster employed by the industry may direct. Neither the Alton nor Indiana Harbor do any other switching or spotting in the plant. All such work is done by the Chicago Belt for itself and for the other carriers in accord with an agreement between them. The Chicago Belt moves all cars from the loading, unloading, and hold tracks in the plant to the plant yard and there classifies them to the extent of putting all cars that are to be moved out of the plant by the Indiana Harbor, Alton, and Chicago Belt on separate tracks in the plant yard designated by the yardmaster. Each of those carriers takes the cars intended for movement outbound in connection with its line from the designated track. Cars are not further classified by the Chicago Belt within the plant.

Neither the carrier respondents nor the Corn Products refining Company introduced any factual evidence at the

hearings in September and November 1943, showing the circumstances or conditions that affect switching within the plant or the manner in which that switching is performed. A successor in office to G. J. Shreeve, General Superintendent of the Chicago Belt in 1932, testified that present conditions are substantially the same as those described by Mr. Shreeve November 11, 1931, except that the volume of traffic has increased and more engine hours are required to perform the service. John W. Bingham, Traffic Manager of the Corn Products Refining Company testified September 30, 1932, as to some phases of the plant's switching. They elected to rest that phase of the present investigation on that testimony and the testimony of employees of the Commission who for 5 days observed the switching within the plant. The accuracy of the testimony given by the Commission's employees is not questioned and it does not differ in any material aspect from that given by Messrs. Shreeve and Bingham, except that it is more complete.

A check of inbound cars loaded and empty delivered at the plant on August 10, 1943, was made by the Commission's employees. That check shows that 9 cars of corn were delivered in the plant yard at 9:30 a.m. by the Chicago Belt. Seven of them were placed at the corn elevator at 1:10 p.m. and the empties were returned to the plant yard at 9:15 p.m., August 11, 1943. Two other cars of corn were moved from the plant yard to track 1-A at 2 p.m., thence to the elevator at 9:50 a.m., August 11, 1943. Those two cars, after they were unloaded, were moved to track scales and weighed light at 6:40 p.m., and moved to the plant yard at 12:30 p.m. Seventeen cars of corn were delivered by the Indiana Harbor on the northern boundary track from where they were moved to the elevator at 7 p.m., and the empties to the plant yard at 10:25 a.m., August 11, 1943.

Eight cars of coal were delivered on August 10, two by the Chicago Belt at the plant yard at 9:30 a.m., and six by the Indiana Harbor on the northern boundary track. The two cars were moved to the coal dock at 6:55 a. m., August 11 and the empty cars to the plant yard at 1:35 p.m., August 11. The six cars were moved from the north-

ern boundary track to the syrup yard at 1:40 p.m. Two of them were moved from the syrup yard to the crane shed by railroad engines, thence to an unloading point on the coal dock tracks by a crane owned and operated by the industry. The other four cars were presumably moved from the syrup yard to the unloading point by the crane. Four cars of bottles were delivered in the plant yard by the Chicago Belt at 9:30 a.m., August 10, 1943. Three of them were moved to the syrup yard at 1:20 p.m., where they were unloaded. The other car was first moved to track 1-A at 1:20 p.m., thence to building 10 at 3:15 p.m., where it was unloaded. The only other inbound commodity received on August 10, 1943, was two cars of starch, one of which was placed in the plant yard at 9:30 a.m., moved at 2:20 p.m., to another track in the same yard, thence to building 42 at 5:15 p.m. where it was unloaded. The other car was moved from the north boundary track to one of the tracks serving the corn elevator at 7 p.m., thence to the plant yard at 12:25 a.m., August 11, thence to building 32 at 12:05 p.m., August 11 where it was unloaded.

Among the empty cars delivered at the plant on August 10 that moved outbound loaded were 24 containing feed loaded on the north side and one loaded on the south side of building 16. Seventeen of those cars were placed for loading at 1:27 p.m., August 11 and after being loaded were moved to the plant yard at different hours on August 12 and 13 to be held for billing instructions. One car placed for loading at building 16 at 12:50 p.m., August 10 after being loaded was moved to the plant yard for holding at 11:50 p.m., August 11. Another placed at the same time was switched to the south side of building 16 and after being loaded was returned to the plant yard for holding. Six empty cars were placed for loading at building 16 at 11:05 a.m., August 10. After being loaded three were moved to the plant yard at 9:55 a.m., August 11 and three at 12:50 a.m., August 12. Billing was usually received for the hold cars within 24 hours after they were moved to the plant yard although in some instances cars were switched to other tracks and held for longer periods. After billing was received the cars held in the plant yard were

classified and placed on separate tracks for delivery to the carriers that were to move them outbound.

Nineteen outbound cars contained starch. Nine of them were placed for loading at building 25 at 10:15 p.m., August 10. After being loaded six of them were moved to the plant yard at 11 p.m., August 11, two at 12:15 a.m., and one at 9:40 p.m., August 12. Those cars were held in the plant yard for varying periods from 4.5 to 28.5 hours. Three were held for over 12 hours. Two cars were placed at building 27 at 8:45 and 9:05 p.m., August 10, and after being loaded were moved to the plant yard at 11:25 p.m., August 10 and 9:30 p.m., August 12. They were placed on the tracks for outbound movement August 13 and August 14, respectively. Of the empty cars brought into the plant on August 10, 1943, and shipped outbound loaded, thirteen contained sugar, five meal, four syrup, two corn oil, and two dextrine. Five of the cars containing sugar were placed at the north side of building 45 at 4:10 p.m., and the others at 7:10 p.m., August 10. After being loaded three were moved to the plant yard about 6 p.m., August 11 and two to lead H at 4:30 p.m., August 12. Those cars were moved out of the plant yard at 3:30 a.m., August 12 and off of lead H August 12. Six of the cars containing sugar were first placed for loading at either building 45 or 48 at different times on August 11 and after being loaded or partially loaded, they were moved to the tracks serving the coal dock or to another building, thence to the plant yard, thence out of that yard August 13 or 14. Two cars were placed at the north side of building 45 at 4 p.m., August 11 and after being loaded were moved to either lead G or H. The five cars loaded with meal were placed at building 16, two at 12:50 and three at 1:27 p.m., August 11 and after being loaded were moved to the plant yard where they were held awaiting billing. They were placed on the outbound yard tracks August 13 and 14. The cars of corn oil moved from building 70 directly to lead H at about 6 p.m., August 11 and out of the plant on the same day. The cars of dextrine moved from building 42 and 30 at 5:15 and 11:45 p.m., August 11 and out of the plant at 3:30 a.m., August 12 and 2:55 p.m., August 13, 1943. Two empty cars were placed at the north side of building 28 at 5:30 and 10:15

p.m., August 10 and after being loaded with starch were moved to the plant yard at 6 and 7:25 p.m., August 11 and were placed on the outbound tracks in that yard at 6 a.m., August 14 and 3:30 a.m., August 12. Three cars were placed at the north side of building 30, one at 8:10, one at 8:20, and the other at 10:15 p.m., August 10. After they were loaded they were moved to the plant yard at 9:30 and 11:20 p.m., August 12. They were placed on the outbound tracks in that yard at 2:55 a.m., August 13 and 3:30 a.m., August 12, respectively. The data is incomplete as to the other cars brought into the plant on August 10. Some of these were evidently held in the plant until after the Commission's employees' inspection was completed.

During the year August 1942 to July 1943, inclusive, the railroads serving the plant handled inbound 30,029 loaded and 18,521 empty cars and outbound 29,361 loaded and 19,255 empty cars or a total of 59,390 loaded cars and 37,776 empty cars. The loaded cars averaged 82 inbound and 80 outbound a day, which is considerably more than the number shown by the check made by the Commission's employees. That check, however, does not include cars loaded or empty that were received at the plant prior to August 10 although they may have been handled on that day or one of the other days covered by the check. Therefore, the data contained in that check are not representative of the volume of traffic moving into and out of the plant or within the plant. It is convincing, however, that the manner in which the traffic is handled precludes the placement of cars and the movement of outbound cars by the three carriers reaching the plant individually or by the Chicago Belt acting for all of them at their or its convenience in uninterrupted switch movements.

The Commission's employees also observed all of the switching done by all three engines from August 10 to August 15, 1943, inclusive, and testified as to the manner in which it was performed. The Diesel engine operates three 8-hour shifts a day. Beginning at 7 a.m., it moves cars of cinders, usually about five loads, from the power house building 23, to the cinder dump and at noon moves, usually about two cars of fine coal from building 16 to the

coal dock. Those are intraplant movements and pass over track 2. After moving the cinders the Diesel engine next pulls empty cars from the corn elevator tracks. This is accomplished by coupling the cars from the west and pulling all of the loaded and empty cars on each track to the plant yard. The loaded cars are cut out and the empties which have been inspected are classified and placed on the proper track according to whether they are to be used for loading in the plant or to be returned to the carriers' yards. Cars loaded with corn are then pulled from the several tracks in the plant yard and spotted on the three elevator tracks. The industry's yardmaster instructs the switching crew of the order in which the cars are to be spotted so that they may be reached in the sequence desired. The loaded cars pulled off the elevator tracks with the empties are usually required to be respotted so that they may be unloaded before the other cars. The tracks east of the elevator each hold 18 cars. Loaded cars are placed on those tracks with one car on the track scale and the others coupled thereto. After cars are unloaded they are moved by a car puller with some gravitational assistance west of the elevator. Cars spotted at the south side of buildings 5, 9, 22, 11, and 21 would interfere with the switching of the northern elevator track. It might be possible to avoid moving cars standing at buildings 22, 11, and 21 by using the crossover from the adjoining elevator track but cars standing at building 5 and the eastern half of building 9 would have to be moved before that elevator track could be switched. The pulling of the loaded cars, the movement both ways across the plant and the respotting thereof is solely for the plant's convenience. That crew also moves cars loaded with meal from building 16 to the plant yard placing them on tracks designated by the yardmaster. Another engine spots the empties. The Diesel engine crew also places empty box cars and moves loaded cars from the north side of building 48. It also places five or six empty tank cars at the cleaning spots at buildings 53 and 56 which are served on the north side by the same track that serves building 48 from the west and building 16 from the east. After the cars are cleaned occasionally one or more is taken to the track scales for weighing and returned to building 56 for loading. After each car is loaded it is moved down to make room for the next one. Subse-

quently they are moved to the syrup yard to be held for testing of the contents and billing. They are usually moved from the syrup yard to a track scale and weighed before they are billed but occasionally a car is weighed before being moved to the syrup yard. This crew also handles cars loaded with bottles or drums separately or a few at a time instead of all in one movement from the plant yard to the various tracks in the syrup yard and places them at the unloading platforms at building 6. After the cars are unloaded this crew moves the empties to the classification yard. It also places loaded cars and removes empty cars from buildings 41 and 98. Other work performed by that crew consists of breaking up of trains left on plant tracks other than in the plant yard by the Indiana Harbor, moving tank cars to the syrup yard and placing tank cars that are in bad order on the repair track and moving cars that have been repaired from that track. The movement of the cars to and from the repair track is presumably service for the Crystal Car Line Express and involves movements from one end of the plant to the other over track 2, among others, thus causing further interference with plant switching. The steam engine crew that reports at 7:30 a.m., arrives at the plant between 9:30 and 10:40 a.m., and handles from 59 to 75 loaded and empty cars from the Clearing Yard to the plant. After entering the plant gate the train is stopped and moved in cuts of not more than 20 cars at a time to the plant yard where the cars are placed on tracks designated by the plant yardmaster. The conductor then received instructions from the plant yardmaster to place a specified number of empties on different tracks in the eastern part of the plant and to respot loaded cars, identified by numbers and their location, at specified points in the east end of the plan for further loading or processing. Before that work is completed the crew go to lunch. During the lunch period further oral instructions are received from the yardmaster. The afternoon's work consists of switching loaded cars from various tracks east of track 2, including hold cars, to the plant yard, moving cars of coal from the plant yard to the coal dock, switching empty cars from the coal dock to tracks to be picked up for the return movement to the Indiana Harbor's yard, performing switching in the

west end of the plant, and switching cars from one track to another in the plant yard. On August 10 that engine completed the work assigned to it by the yardmaster considerably before 3:30 p.m., but was not granted permission to leave the plant until that hour. The earliest that engine left the plant during the 5 days was 3:30 p.m., and the latest 4:05 p.m. Each day it moved from 20 to 30 cars back to the Clearing Yard. All the time this engine is operating in the plant the Diesel engine is also operating, as shown above, over many of the same tracks, including tracks 1-B and 2. August 10 it was blocked in the plant yard for 12 minutes and it is a reasonable conclusion that the coordination of the switching of the inbound and outbound cars with the intraplant movements by the yardmaster prevented further interference by one engine with the other. Some of the delays encountered by this engine on other days were August 11, 10 minutes in weighing coal, 12 minutes caused by interference by the Diesel engine, and 40 minutes waiting for the other steam engine to arrive at the plant; August 12, 3 minutes for removal of runways and 35 minutes for permission to leave the plant; August 13, 40 minutes for permission to proceed to Clearing Yard; and August 14, 7 minutes weighing coal and 1 hour and 5 minutes waiting for permission to leave the plant. There is a single track branch line from the departure point in the Clearing Yard to the plant that serves only the plant. The movement of trains over that track is under control of an employee of the railroad who has his office about 3,500 feet from the plant and it is his authorization that is necessary for the engines to leave and come into the plant. Except for a crossing of the main track near the departure point from the Clearing Yard and one movement each way in the afternoon of a train or engine over the branch line, conditions in the plant are the cause of delays in the movements between the Clearing Yard and the plant. The engine that might cause interference leaves the Clearing Yard at 2:45 p.m., and on all except one of the 5 days it ran light to the plant.

The steam engine which leaves the Clearing Yard at 2:45 p.m., after arriving at the plant and receiving instructions from the yardmaster, usually first classifies empty

cars, arranging those to be placed for loading at the plant in the sequence directed by the yardmaster so as to expedite placement at the designated loading points. Most of the time before the crew goes to dinner is used in switching that part of the plant south of track 1. Each of the 14 buildings in that section of the plant has several loading and unloading points. As the same track serves from three to five buildings and as some can only be switched from the west and others from the east, it is frequently necessary to pull and respot all intervening cars in order to pull or place a car behind them. Building 42, although larger than the others, affords an illustration of the character of spotting service required. This building is approximately 1,200 feet long from east to west and 200 feet wide. It is served on the north side by a track stubbed on the west end, which also serves buildings 30 and 32 east thereof, and on the south by a single track that can be switched from both ends. The building has about 15 doors, more than a car length apart, used for loading and unloading. The yardmaster directs that certain cars be placed at specific doors. All cars have to be spotted and pulled from the doors by engines. That may mean that the entire track may have to be switched to place one or more cars on it, in which case the entire string of cars would be pulled to the plant yard for rearrangement and then be respotted. After dinner the crew gets additional instructions from the yardmaster directing spotting north of track 1 of 10 or 12 empty cars at the west end of the plant and from 10 to 16 cars at the east end of the plant at various buildings. The cars standing on the tracks on which the engine enters to make such placement are marked to show whether they are to go out, to be held for billing, or to be respotted to complete loading. Those directions are complied with before empty cars are placed. As the plant yard is the only place in the plant where such separation can be made, the entire string of cars must be hauled to that yard and the empties be interspersed among those to be respotted in order to permit replacement of the latter at the desired points.

The cars marked to be held usually comprise a considerable proportion of the total number of loaded cars. For example, on the night of August 11, 1943, 6 out of 16 cars

moved from the eastern end of the plant were marked to be held for billing. The principal reason for holding cars is to make laboratory tests of their contents. Frequently, after the tests are completed cars have to be returned from the plant yard to one or another of the buildings for reprocessing. The Diesel engine is operating in the plant during the entire period this engine is switching the plant.

The crew that takes over the operation of the Diesel engine at 11 p.m., first performs switching in the plant yard. That work consists principally in cutting out cars that are ready for outbound movement from among others that are not ready for shipment and after making the necessary separation placing them on the outbound tracks. The cars thus switched are those previously brought from the loading points in the plant to the plant yard to be held for shipping orders. About 1 a.m., each night that crew moves loaded cars of feed from the north side of building 16 to the plant yard. The cars on which billing is received are placed on the proper outbound tracks. Those marked to be held are placed on hold tracks. During the 5 days the Commission's employees observed those operations that crew moved 59 cars from building 16 of which 8 were marked as ready for shipment and 51 were marked to be held for further instructions. That crew also switches empty cars from the track south of building 23 and cars loaded with coal from the plant yard or coal dock tracks to unloading points on the latter tracks. The only other service generally performed by this crew is to remove cars ready to go out over the Chicago Belt from the plant yard to the east gate and hold them there until an engine arrives to haul them to the Clearing Yard. During the 5-day period of observation that crew usually had a "slack period" of about from 1 to 1.5 hours each day and in addition thereto wasted from 1 to 2 hours holding the train at the east gate. There is an incline at that gate and the Diesel engine acts as a pusher assisting the line haul engine over that adverse grade.

None of the carriers know or can know when the cars loaded or empty leave its classification yard for the plant where or when they are to be placed. In 1932, Mr. Bingham testified there were 17 miles of track composed of

65 or 70 separate tracks and 26 buildings with about 50 loading and unloading points in the plant. The trackage has been increased to 23.5 miles. A list purporting to give the numbers and names of buildings in the plant revised to June 1, 1942, was introduced in evidence. It does not show at which of those buildings or at how many of them there are loading and unloading points. The names of the buildings as there set forth are descriptive of the activities carried on in them. In a few instances as many as 6 designations and in others from one to 5 designations indicating as many uses are shown for one building. Judging only from the names there would appear to be approximately 38 buildings at which cars are probably loaded or unloaded. The plat of the plant indicates that there are probably over 50 buildings east of tracks 1-B and 2. As we have seen, there is more than one loading and unloading point at many of them. Counsel for respondents on brief states there are 69 tracks on which there are 62 loading and 68 unloading points and 37 buildings that are directly served by railroad tracks. The evidence shows that more than one commodity is loaded or unloaded at the same building in some instances and that the same commodity is loaded or unloaded at different buildings. When cars arrive at the plant, neither the railroad conductors nor the plant yardmaster know where or when they are to be placed. Mr. Shreeve testified that the engines that bring cars into the plant, if they were not assigned other work by the plant yardmaster, would have to stand idle for several hours or longer until the questions of placement were determined. In making that determination the operating needs and practices of the industry are of prime, if not controlling importance. Both inbound and outbound cars are frequently moved to more than one point in the plant before being placed or delivered to the carriers. The reasons for some of those movements are undisclosed but probably are the inadequacy of plant facilities and industrial operating needs. One disclosed reason is the holding of cars for billing instructions. Such cars constitute a large percentage of the outbound loaded cars. The extra service entailed in switching them, sometimes

the same car several times, is clearly not compensated for by the line-haul rates.

Practically all of the tracks east of tracks 1-B and 2 and east of the plant yard that serve loading and unloading points pass between buildings for practically their entire length except the north boundary track and the most southern through track. The latter is a single track and serves the south sides of three buildings, one of which is building 42. All traffic moving over the tracks north of track 1 except the northern boundary track has to pass through the bottleneck on tracks 1-B and 2. Few of the buildings can be switched without encountering interference from cars being loaded or unloaded at other buildings. The interfering cars have to be hauled to the plant yard, hauled back, and replaced. In addition, there are many other intraplant movements such as the resetting of cars that have been previously moved to and held in the plant yard for further loading or the reprocessing of their contents, weighing of cars light and loaded for industrial purposes, and the movement of cars from one loading spot to another. Nearly all the coal received in the plant, 15 or 20 cars a day, is reweighed and we have seen that most of the tank cars loaded at buildings 53 and 56 are weighed before they are billed. Further interference is caused by the location of the Crystal Car Line Express yards and shop within the plant and the cleaning of tank cars at building 53.

There is considerable discussion in the record and in brief by counsel for the industry as to the relevancy of the movement of the empty tank cars in the plant to the carriers' obligations under the line-haul rates. The industry furnishes the tank cars and is paid by the carrier for their use. In the absence of evidence to the contrary it must be assumed that such compensation relieves the carrier from the obligation to furnish suitable equipment and includes all conditioning of the cars including cleaning. The industry is responsible for the presence of the Crystal Car Line Express' yards and shops within its plant and, therefore, for interference caused by the movement of the tank cars of that company in and about the plant.

The evidence is convincing that the placement of inbound cars and the movement of outbound cars are so intermingled with intraplant switching and so integrated into the operative methods of the industry under present practices that the interstate and intraplant movements are inseparable; and that not only is the Chicago Belt prevented from switching the inbound and outbound cars at its convenience in single movements without interruptions and interferences but that it has no discretion as to when or how those services are performed. For all practical purposes the industry has complete control over the engines while they are in the plant to the same extent as if it owned them. This is in accordance with an agreement between the Chicago Belt, Indiana Harbor, Alton and Baltimore and Ohio Chicago Terminal. Counsel for the industry argues that the industry is not a party to that contract but the evidence is conclusive that the industry has elected to and does exercise sole and exclusive control over all switching within the plant and it strongly indicates that no other method of operating would meet the industry's needs and convenience.

The industry pays a switching charge for some of the intraplant movements. Such payments do not relieve it of responsibility for interruptions and interferences to other switching caused by the intraplant switching. The fact that a carrier undertakes to perform for compensation a service beyond its common carrier obligations does not enlarge its duties under the line-haul rates or transform interruptions and interferences caused by such accommodation services into "railroad interferences" or "railroad operating delays" as contended by the industry.

The previous discussion herein deals with the situation where the Chicago Belt does all of the switching. The conclusion is that even if the Chicago Belt were the only carrier reaching the plant the services rendered would be beyond the scope of the legal obligations assumed under the line-haul rates, but there is a further issue involved.

In *Kingan & Co. Terminal Services,* 255 I.C.C. 531, the carrier had instituted a pooled switching operation but it was there indicated that while it was impracticable and undesirable for each of the carriers serving the plant

to perform its own switching, it would be possible for them to serve the plant by pooling operations and coordinating them to the plant's operations. Division 3 there said:

> No duty devolves on a carrier to pool switching services in order to accommodate an industry when they could not individually perform the service with their own power, at their own convenience and free from interference.

It follows as a matter of course that the fact that carriers have pooled services as they have done here does not create an obligation that did not previously exist, and that if they can not individually serve the plant, because of interference by one carrier's engine with another, there is no obligation on them to do so under a pooling arrangement.

The actual switching operations as described above prove that it is impracticable, if not impossible, for each of the carriers serving the industry to perform its own switching without interference and at its convenience. This is confirmed by Mr. Bingham who expressed the opinion that they could not do so, saying that there is a legend that they tried it at one time and that such chaos was never seen before in the Chicago switching district.

Evidence was offered to prove that there are large terminals other than Chicago and that usually the same interstate rates apply to all industries in the same switching district, and on objection it was excluded. Exception was taken to that ruling at the hearing and was renewed on brief. The existence of the large terminals is a matter of common knowledge and well known to us. The application of the same interstate rates to all industries in the terminal district has been recognized by us in this and in many other proceedings. In the original report herein we said at page 17:

> The published tariffs generally establish switching limits at the various destination points. Delivery within those limits is paid for when rates are collected to those destinations. In some cases the switch-

> ing limits are definitely defined by boundaries, and at others the industries included within the switching district are named. There is no dispute that delivery at the various industries is covered by the published rate.

and on page 32:

> To summarize, it is well settled that carload freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers. * * * It is likewise clear from these same authorities that service beyond such reasonably convenient point is not a service which the carrier is obligated to perform or pay for under its line-haul rates.

Other evidence excluded was offered to prove what counsel calls the "characteristics of the American rate structure," a matter fully dealt with in the quotation next above. The evidence referred to above is immaterial and irrelevant and was properly excluded.

Other evidence was offered for the purpose of showing the services performed at other industrial plants with which the Corn Products Refining Company competes. The Chicago Belt sought to introduce an exhibit showing the number of loaded cars moving into and out of the Clearing industrial district in Chicago during the year September, 1942, to August, 1943, inclusive, and the total number of engine hours and the engine hours per car required to move those cars. The Alton sought to introduce a cost study made in 1927 showing the cost per car to each carrier serving Chicago for classifying, transferring, interchanging, weighing, icing, and handling to and from freight houses, team tracks, and industries in the Chicago terminal. The industry sought to introduce evidence taken from a record in another proceeding giving a description of the Chicago terminal and the switching performed therein.

The evidence as to other competing industries was offered to show undue prejudice and preference. That as to the Clearing industrial district which is east of Argo and north of the Clearing Yard, and that as to the Chicago switching district as a whole, was offered for comparison with conditions encountered and services rendered at the Corn Products Refining Company's plant. The cost study was offered to permit a comparison of the cost to the Chicago Belt of switching 5 team tracks and 183 industries in the Chicago district in 1927, with the cost of switching the Corn Products plant in 1927. Objection was offered to all of that evidence and it was excluded as being irrelevant and immaterial. Rule 87 of our Rules of Practice provides in part that "An objection not pressed in brief will be considered as waived." The Alton did not file a brief. The Chicago Belt pressed its objection to the exclusion of the evidence offered by it in its brief. The industry states on brief that it is pressing every objection made to every ruling excluding evidence. The evidence offered to show undue prejudice and comparisons with switching at other industrial plants and at terminal districts or parts of terminal districts was properly excluded. That such testimony is irrelevant and immaterial was settled by the Supreme Court in *United States* v. *Wabash*, 321 U. S. 403, 322 U. S. 195.

The Court in 321 U. S. 403, at pages 410 and 413, said:

> Their contention, upheld by the court below, is that the Commission's order cannot be supported merely by the circumstances disclosed by the evidence respecting the operations at the Staley plant, but that its validity must turn upon a comparison of the conditions at the Staley plant with those at competing plants. They urge further, and the District Court so held, that, as it appears from the record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley, contrary to §§ 2 and 3(1).
>
> This argument ignores the nature of the present proceeding which is to enforce § 6(7), not §§2 and 3(1). Section 6(7) prohibits departures from the

filed tariffs and it is violated, as the Commission has pointed out, when carriers pay the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge. This prohibition applies without qualification to every carrier and when, as here, the unlawfulness of the allowance or service is shown by the conditions prevailing at a particular industrial plant, it is unnecessary, in order to support the Commission's order, to consider whether generally similar allowances or services at other plants are, or are not, lawful under conditions prevailing there.

* * * * * *

So far as the District Court found that the Staley Company was being discriminated against by the continuance of the service at other plants, its finding is irrelevant to any issue in the present proceeding which relates only to violations of § 6(7) and not §§ 2 and 3(1).

* * * * * *

While it is the duty of the Commission to proceed as rapidly as may be to suppress violations of § 6(7) in the performance of spotting services, that is to be accomplished, as we have held, by an investigation of the traffic conditions prevailing at each particular plant where the service is rendered and not by comparison of the services rendered at different plants.

None of respondents filed exceptions to the proposed report, but the industry in its exceptions and on argument presses a contention that the exclusion of the evidence offered was error and that it was admissible and necessary to show what constitutes "simple switching or team track delivery" or "the equivalent of team track or simple switch placement," phrases that were used in the original report as synonymous. In that report we recognized that those phrases did not clearly define and determine the precise limit beyond which line-haul rates do not apply.

We used them as descriptive of a service well known to everyone with even a slight familiarity with railroad transportation. In the original proceeding we said, at page 44:

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act.

We are not here confronted with the interpretation of a statute or a rule of practice published in a tariff, but only with the question of the meaning of expository phrases used by us. We believe that the meaning of those phrases and the switching service which they are intended to describe are made sufficiently clear in the original and the seventy-third supplemental reports in this proceeding. Evidence describing the Chicago switching district, probably the largest and most congested terminal in the country, evidence showing the cost of switching, including line-haul and cross-town hauls in that terminal, or evidence describing the Clearing industrial district, in which there are 107 industries, 198 tracks with a car capacity of 1,306 cars, only one of which is a team track, and more than 900 places where cars are customarily loaded and unloaded, is not necessary to advise us what we meant by "the equivalent of team-track or simple switch placement" or the service required to make such placement. Clearly such evidence was not admissible for that purpose and we affirm its exclusion. The descriptive phrases re-

ferred to were intended to be a flexible guide, rather than a fixed standard of measurement, as to which proof is not necessary. The delivery service referred to therein consists of the movement of cars between team or industrial tracks and a carrier's tracks adjacent thereto and connecting therewith, and does not include the movement between the carrier's classification yard and the connection with the team or industrial track. These phrases have no reference to uneconomical or unusual team or industrial tracks, average conditions encountered on all such tracks and average conditions in parts or all of one or more switching districts, and evidence as to such matters is irrelevant and immaterial.

The Corn Products Refining Company's plant at Argo is within the Chicago switching district and it is entitled to have cars moved directly to and removed from a reasonably convenient place at its plant site at the line-haul rates. This does not necessarily mean the points where the industry loads or unloads freight. In determining what is a reasonably convenient place for delivery or the point at which the convenience of the industry begins and the carrier's service ends, or vice versa, a line of demarcation must be drawn between industrial switching in a plant and services included in transportation at line-haul rates.

We find that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points; that the plant yard described above constitutes such a reasonable point for the delivery and receipt of cars by the Chicago Belt and Alton; that the Indiana Harbor's yard adjacent to the plant or the main tracks within the plant taking off of its lead track from that yard, whichever the parties may agree on, constitutes such reasonable point for the delivery and receipt of cars by the Indiana Harbor; and that the transportation services which it is the duty of respondents to perform for the Corn Products Refining Company under the line-haul rates begin and end at those tracks.

We further find that the performance by respondents, without charge in addition to the line-haul rates and charges, of service between the tracks described in the next preceding paragraph and points of loading and unloading

within the plant of the Corn Products Refining Company results in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6(7) of the act.

An appropriate order will be entered.

MILLER, *Commissioner*, concurring:

The record in this proceeding shows instances of plant disability of such a nature as to give support for the finding that respondents' transportation obligations cease when the cars are placed upon the interchange tracks. It is apparent, however, that respondents and the industry can work out some plan of switching which would eliminate interruptions and permit services within the principles announced in the original report, so that cars may be placed in the plant at some points beyond those designated in the report.

Commissioner Mahaffie dissents.

Commissioners Aitchison and Alldredge did not participate in the disposition of this proceeding.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Ex Parte 104

CORN PRODUCTS REFINING COMPANY TERMINAL SERVICE

Practices of Carriers Affecting Operating Revenues or Expenses

Part II, Terminal Services

Submitted June 12, 1946. Decided July 1, 1946

Findings in prior report that respondents' line-haul rates do not include services beyond the interchange tracks described in the report, and that the performance by re-

spondents of services beyond those points without compensation in addition to the line-haul rates are in violation of section 6 (7) of the Interstate Commerce Act, affirmed. Prior report 262 I. C. C. 57.

John R. Barse, Leo P. Day, Bryce L. Hamilton, and G. W. Lademann for respondents.

Parker McCollester for the industry.

John S. Burchmore for the National Industrial Traffic League and A. E. Staley Manufacturing Company.

Allen Crenshaw for Interstate Commerce Commission.

Seventy-Fourth Supplemental Report of the Commission on Further Hearing

PATTERSON, *Commissioner:*

Exceptions were filed by the Corn Products Refining Company to the report proposed by the examiners and we have heard oral argument.

In the original report, *Propriety of Operating Practices —Terminal Services*, 209 I. C. C. 11, certain principles were announced concerning the payment of allowances to industries for performing spotting services at industrial plants and concerning the performance of such services by respondent rail carriers. The issues in the seventy-fourth supplemental report, 262 I. C. C. 57, hereinafter referred to as the prior report, in that proceeding were decided by us April 2, 1945. We found that the interstate line-haul rates of respondents cover the delivery and receipt of carload shipments at reasonably convenient points at the plant of Corn Products Refining Company at Argo, Ill.; that the plant yard described in the report constitutes such a reasonable point for the delivery and receipt of cars by The Belt Railway Company of Chicago, The Alton Railroad Company, and The Baltimore and Ohio Chicago Terminal Railroad Company;[1] that the Indiana Harbor Belt Railroad Company's[2] yard adjacent to the plant or the tracks

[1] For convenience the carriers herein named will be referred to as the Chicago Belt, Alton, and B. & O. Chicago Terminal.

[2] Herein after referred to as the Indiana Harbor.

within the plant taking off from its lead track from that yard, whichever the parties may agree on, constitutes such a reasonable point for the delivery and receipt of cars by the Indiana Harbor; and that the transportation services which it is the duty of respondents to perform for the Corn Products Refining Company under the line-haul rates begin and end at those tracks. We further found that the performance by respondents, without charge in addition to the line-haul rates and charges, of services between the tracks described next above and points of loading and unloading within the plant of the Corn Products Refining Company results in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act. On petition of the industry the proceeding was reopened July 2, 1945 for further hearing. The further hearing has been held.

The Corn Products Refining Company manufactures various products from corn. Its plant at Argo is within the Chicago, Ill., switching district adjacent to the western boundary and about midway between the northern and southern boundaries of that district and about 20 miles southwest of the business center of Chicago. The designations and descriptions of the tracks and buildings in the plant used herein are those used in the prior report.

The evidence at the further hearing shows that in 1943 and 1944, 15,000 feet of new 85-pound rails were used in relaying 64 out of 122 "track turnouts," reconditioning the remaining 54 "track turnouts" and straightening and relocating tracks. The stubbed track running north to building 98 from the northern boundary track, those parts of the stubbed tracks that extended west of the permanent bridge between buildings 40 and 42, and most of the stubbed track that diverged from lead H and served building 3 have been removed and a short track has been built to connect the track left south of building 3 with the northern elevator track at a point east of the elevator. The described improvements do not appreciably change the general plan of the track layout or remedy the conditions that are conducive to interruptions in and interferences with switching operations in the plant.

The stationary bridge between buildings 39 and 88, erroneously referred to in the prior report as being between buildings 29 and 80, has been moved about 150 feet west for the convenience of plant employees. This permits the serving of buildings 39 and 88 from the east but prevents service from the west, which means a considerably longer haul. In order to switch those buildings from the east, the traffic would have to move from the plant yard, through the plant, onto the Chicago Belt's lead and by a reverse movement to buildings 39 and 88. At the argument we were advised that that bridge has been mechanized so that it can be lifted to permit the passage of engines and cars. The bridge between buildings 47-A and 40 has been removed, thus eliminating probable delays waiting for that bridge to be lifted. The bridge between buildings 46 and 48, erroneously referred to in the prior report as being between buildings 47 and 48, has been mechanized and the key for the bridge between buildings 39 and 40 is now left with a man employed in building 39. The industry says that it knows within three hours of when respondents' engines will pass under the latter bridge and that it is now lifted before they arrive. These changes reduce delays heretofore encountered at the bridges.

Except for the removal of the three tracks, the addition of one and the changes in the bridges, the description of the track layout and the location of the buildings in the prior report correctly describes the present physical conditions in the plant.

It was and now is the practice of the industry's yardmaster to call the four carriers and find out the number of cars they have on hand ready for delivery at the plant, and the commodities contained in those cars. The industry says that at the time of the former hearing the yardmaster specified the number of cars of each commodity the carriers were to deliver, but that now the carriers deliver all cars they have on hand. No cars are held back at the order of the industry except cars of corn when during the peak season the receipts exceed the quantity that can be unloaded. No restrictions are put on the time when the carriers may move cars between their yards and the plant yard or on when the Indiana Harbor Belt may place cars on the tracks

that run westward from its lead into the plant. The industry now schedules its orders to meet its needs. The consignees are requested to ship on specified dates and the carreirs are requested to expedite the movement of cars by "dispatching preferences." This is said to have eliminated congestion in the plant yard which existed at the time of the former hearing and which it is said was caused by the bunching of cars.

The testimony of our employees at the prior hearing indicates that generally the Chicago Belt brought cars into the plant yard once a day at about 9:30 a. m. and there is no evidence in the prior record showing that either it or the other carriers did not move traffic to and from the plant yard, except such cars as were marked for holding, at their convenience or that the capacity of the plant yard was inadequate. Those questions were not discussed in the prior report and the findings therein were not predicated on the manner in which the traffic was handled between the plant yard and the carriers' yards. On the contrary, it was assumed that those movements were made at the carriers' convenience and that the plant yard had an adequate capacity.

It is no longer necessary to classify box cars in the plant yard by length or cubical capacity and place cars of specified sizes at the various loading points to "fit the orders", as the loads are now made to meet the size of the cars and the cars are now used on a "run of mine" basis at all loading points, in accord with our service orders. Tank cars are now separated when they are received at the plant according to the types of products that are to be loaded into them, instead of just shoving them on a track and classifying them in the plant yard when the industry is ready to use them. These changes should reduce switching previously required to classify cars in the plant yard, but they do not remove or reduce interruptions or interferences encountered in the switching operations between the plant yard and the loading and unloading points.

An important change has been made in the manner of handling tank cars of syrup since the last hearing. Syrup loaded in tank cars is now analyzed more promptly. The first analysis is made before the cars leave the loading

spots. If that analysis shows that the syrup is below standard, it is verified by another analysis, but the cars are shipped without waiting for the results of the second one. The consignees are advised of the results of the second analysis and adjustment in the price is made in accordance therewith. It is only when there is a radical departure from the normal standard, which is very rare, that cars are held or returned for reworking. This should eliminate the holding of cars of syrup in the syrup yard and intraplant movement of the loaded cars to and from that yard. To what extent, if any, it delays the movement of the cars from the loading points and thus interferes with the placement of tank cars for cleaning east of building 53 is not shown.

The weighing of inbound cars of coal, coal moved intraplant from the storage pile, and inbound shipments of some undisclosed bulk commodities has been stopped, except that from time to time inbound shipments are "spot weighed" to check invoice weights. The weighing of the outbound cars of syrup and other commodities is not said to have been stopped. Grain is presumably weighed by the industry on scales at the elevator. Therefore the extent to which the stoppage of the weighing of inbound bulk commodities affects the switching is problematical, but the cessation of the weighing of coal should have an appreciable beneficial effect as about 20 or 25 cars were previously weighed a day.

The industry says it has requested its consignors to "card cars" showing the commodities shipped therein and that the train crews that bring the cars to the plant have "train sheets" showing the contents of each car in the inbound train. It contends that as the carriers know the contents of the cars they know where a "large proportion" of the inbound commodities are to be placed before the cars reach the plant. The Chicago Belt switching crews that operate in the plant may be able to ascertain the contents of the cars provided they are carded or that they are given copies of the "train sheets," and by reason of their familiarity with the plant's switching operations they probably would have a general knowledge as to where the commodities are to be placed, but where the same commodity may be unloaded at more than one building or on more than one track at a building, as they are in many instances,

the switching crews do not know where a particular car will be placed and in no instance do they know when the plant will be ready to have placement made. The switching crews clearly have no advance information as to when or where cars brought into the plant by the Indiana Harbor and Alton are to be placed.

The industry's yardmaster now, as he did at the time of the former hearing, issues orders to each switching crew, instructing it where and when to spot cars and when and from where cars are to be pulled. There is no yardmaster on duty in the plant after 4:30 p. m., but one lines up the work to be done after that hour by each crew and the crews act only on those instructions. Considerable stress is laid by the industry on the fact that the yardmaster who works the morning trick is about to be retired and that the industry will not appoint another yardmaster, but that the same duties will be performed by "a coordinator for switching movements in the plant only." The industry plans, when the yardmaster retires, to have the railroad furnish an employee or employees to supervise the switching under instructions of the industry. The carriers have not agreed to that plan. The witness for the Chicago Belt states that it does not require that a yardmaster be employed in the plant. The important fact is that such detailed supervision and coordination are necessary and not what the man who performs it is called or how he is paid.

The industry has a program to establish a one-switch-a-day service in the plant, except to the corn elevator, coal dock, and building 16 where two switches a day will be required. It says that under normal conditions one switch a day is sufficient except to the three named places, but that sometimes more than one switch is made when necessary to meet the needs of the industry. So long as cars are available for loading and unloading at the desired spots when they are wanted during the working period from 7:30 a.m. to 3:30 p.m., it does not make any difference to the industry when the switching is done. The plant is open for switching from 3:30 p.m. to 7:30 a.m. and it is a matter of indifference to the industry when, during that period, the carrier complies with the industry's switching orders. It says that loaded cars are usually placed during that period, but also that it does "have an order of pref-

erence" which the carriers are told to follow as "one department may need quicker service than another and we [the industry] point that out to them when we give them instructions on setting or pulling the cars." The question is not what service the plant theoretically requires or what program it may be contemplating but what service is actually rendered by the carriers. It is significant that the industry began studies in August 1943, with the view to reducing the switching in the plant, but that it has not yet instituted the one-switch-a-day program and that no evidence was introduced showing that any specific material change has been made in the manner and time of switching the various loading and unloading points in the plant. The Diesel engine still operates in the plant from 7 a.m. to 3:30 p.m. and a steam engine from about 9:30 or 10 a.m., until 3:30 p.m., during which period, according to the testimony, there is no necessity for any switching in the plant unless it be one switch of the corn elevator, coal dock, and/or building 16, which would hardly require 12 or more engine hours. The evidence introduced at the further hearing does not warrant any belief or conclusion that the switching between the plant yard and the loading and unloading points as now performed differs materially from that observed by our employees and testified to at the prior hearing as described in the prior report.

The industry claims to have reduced intraplant movements by reducing orders for supplies to be shipped to it in mixed carloads and by filling orders for mixed carloads, so far as "customers's satisfaction" permits, with goods produced "on one side of the plant." It is not clear how the movement between points on "one side of the plant" instead of between points on two sides of the plant reduces the number of movements, although it may or may not reduce the length of the intraplant hauls, as in most instances the cars are moved to and from the plant yard. The alleged reduction in intraplant movements was in the course of being made in November 1944. An exhibit shows the intraplant movements for the first 8 months of the years 1944 and 1945, respectively, as: January 426 and 492, February 404 and 428, March 449 and 583, April 221 and 404, May 257 and 503, June 301 and 389, July 311

and 381, and August 290 and 291. These figures contradict up to and including August 1945 the industry's testimony that the number of intraplant movements has been reduced. It may be, however, that the increase in the intraplant movement would have been greater had not some of them been eliminated.

The industry at the time of the hearing had ordered 2 "auto tractors" and 10 trailers and "2 gas tractors and 40 4-wheel hook or tractor trucks" which are intended to be used for all intraplant transportation except the movement of coal and cinders. It was intended that after the truck service was inaugurated there would not be any movement by railroad from one point to another in the plant to finish loading or unloading. Intraplant shipments of cinders ordinarily range from 125 to 160 cars a month. About two cars of fine coal a day at the time of the former hearing moved intraplant from building 16. Coal moves from the storage pile to the coal dock and from the latter to the boiler house. The number of cars handled intraplant is not shown, but about 22 cars a day are unloaded at the boiler house. Cinders and coal will continue to move intraplant by railroad. We were advised at the argument that the contemplated truck services are now being performed. This has undoubtedly eliminated considerable interference of one engine with another. The conditions affecting the switching of the plant are not shown to be sufficiently improved thereby to warrant modification of the findings in the prior report.

Prior to January 1944, the Diesel engine was operated in the plant by three crews, each working 8 hours a day. It is now operated by two crews, one working 8 hours and the other as many hours over 8 as is necessary to complete the work. If the operation of the Diesel engine had been discontinued for an entire 8-hour period during the months August to December 1944, inclusive, there would have been a decrease of 1,944 hours in the time that engine was working. But as shown by the following data, there was only a difference of 600 hours 45 minutes in the time the three engines worked in the plant during the 5-month periods in 1943 and 1944. During that period in 1943, the Belt Railroad switched within the plant 23,621 loaded cars

that moved into and out of the plant and 2,207 cars that moved intraplant. The three engines worked 5,440 hours 48 minutes straight time and 70 hours 42 minutes overtime, a total of 5,511 hours 30 minutes, switching those cars and 14,138 empty cars, or an average of about 12.8 minutes per loaded car. During the same period in 1944, the Belt Railroad switched 22,578 loaded cars that moved into and out of the plant, 1,820 cars that moved intraplant, and 11,326 empty cars in 4,310 hours 45 minutes straight time and 600 hours overtime, or a total of 4,910 hours and 45 minutes, or an average of about 12 minutes per loaded car. During the first 8 months of 1945, the three engines switched 36,595 loaded cars that moved into and out of the plant, 3,471 cars that moved intraplant, and 13,658 empty cars in 8,046 hours, or an average of about 12 minutes per loaded car. The empty cars were disregarded in calculating the average time per loaded car, but the cars that moved intraplant were included.

As shown in the prior report, all inbound traffic moves first to the plant yard (except at the last hearing it was said that very infrequently the Indiana Harbor has spotted a tank car) and then to the loading or unloading points and all empty and loaded cars move from the latter points to the plant yard. While a few points in the plant are switched from the east, the great majority are switched from the west. To move a car from the plant yard to any of the buildings via the east end of the plant it must first be hauled entirely across the plant, frequently onto the Chicago Belt's or Indiana Harbor's main lead, and then be placed by a reverse movement. Where several loading and/or unloading points are served by the same track, which is switched from the west, all loaded and empty cars not ready for outbound movement and all partly loaded cars standing on the track west of the points to be switched must be hauled to the plant yard and afterwards respotted. A similar condition is also encountered when cars are switched from the east. A witness for the industry at the last hearing agreed with a statement of his counsel that "the industry has practically eliminated the setting back of cars which is described in the Commission's report," saying that this has been accom-

plished by adopting a plan of placing cars it has no assurance of loading in one day "at the tail end of the train away from the engine" but he added that there are some exceptions as the industry has "at times setbacks due to a condition beyond our control or that we cannot foresee." It is not clear whether that qualification was intended to be a repudiation of the thought conveyed by the counsel's leading question, but it is clear that if the loading and unloading spots on a single track were ready for switching and were switched at one time, the plan might work as to the car or cars farthest from the engine, but obviously it could not work as to any cars at intermediate points.

A photostat of the map of the plant with legends thereon showing the commodities loaded and unloaded at some of the buildings and the number of cars that can be placed and loaded or unloaded at those buildings at one time was introduced in evidence at the last hearing. A description of the data shown by that photostat on some of the important tracks, beginning with those at the north of the plant and taking them in order southward, may illustrate what has been said herein as to the interference caused by cars standing on tracks.

Lead G from the Indiana Harbor's main lead is a double track. On the southern one of those tracks from west to east are buildings 60, 4-A, 4-B, and 70 and oil storage tanks. At building 60 "package goods, syrup, etc." are loaded and about two cars a day of containers, bag sugar, starch, salt, or cocoa are unloaded. Seven cars can be placed at the platform at building 60 at one time. At building 4-A, four cars a day of empty bottles in containers are unloaded and an unspecified number of cars of the same commodities are loaded for intraplant movement at a platform at which nine cars can be placed. At building 4-B the industry's cranes "spot and load all cars with tin scrap." At building 70, package goods are loaded and empty bottles, containers, shooks and caustics are unloaded. The number of cars loaded and unloaded at that building is not shown. Five cars can be placed at the platform and one car can be placed and unloaded at the oil storage tanks. It is possible to switch buildings 4-A,

4-B, 70 and the oil tanks from the west by means of a crossover from the northern to the southern track without switching building 60, but cars standing at each of the other buildings must be moved before the ones east of them can be switched. All cars brought into the plant by the Indiana Harbor Belt and all cars moving between the five loading and unloading points on lead G and the plant yard must pass over tracks 2 and 1-B.

Building 6 is immediately south of and adjoining building 60. Ten stubbed tracks, each having a 5-car capacity, abut that building on the west and one serves it on the south. There are platforms between the tracks. Four of the 10 tracks are used daily for loading, 4 for storage of tank cars, one for loading, and one for loading and unloading. The track south of building 6 has a capacity of 7 cars. It is used for unloading empty bottles and the east end thereof for unloading tank cars. Those tracks form what is known as and referred to in the prior report as the syrup yard, and all diverge eastward from track 2.

South of those tracks is lead H. The stubbed track reached only over lead H serves the south side of building 4 at which 3 to 5 cars a month are unloaded and buildings 10 and 59 at which crude corn, oil, soapstock, and acid are unloaded from and loaded into tank cars. Occasionally oil containers are loaded at those buildings. Tank cars are washed on the east end of that truck. All traffic moving between the plant yard and those buildings moves over tracks 2 and 1-B. South of lead H are 4 stubbed tracks that diverge eastward from track 2. One of them serves building 24, the paint shop, and six syrup storage tanks, and two serve the "tank car stripping house." We are not told what commodities, if any, are loaded or unloaded on those tracks or for what purpose the other two stubbed tracks are used.

Next to the south are three tracks stubbed on the east ends that diverge from track 2 and pass through and serve the corn elevator. Each track has a capacity of 18 cars east of the elevator and sufficient capacity west thereof (70 cars in all) to hold the empty cars after the grain is unloaded. Loaded cars are placed east of the elevator with one car in the elevator on the track scales. Car pullers

with some gravitational assistance are used to pull the loaded cars into the elevators and the empty cars beyond. The volume of the inbound movement of corn is not shown but the industry says that two switches a day are required, except during the peak season, when more are necessary. The latter statement is presumably based on the fact that the Chicago Belt performs the switching for all of the carriers, for if each carrier bringing grain into the plant were to undertake to place it on the unloading tracks, it is clear that more than two switches a day would be necessary. All traffic moving to and from the elevator passes over tracks 2 and 1-B. The northern is the only one of the elevator tracks that serves any building other than the elevator. It reaches buildings 21, 11, 22, 9, and 5 on the south sides thereof and by means of a spur track diverging therefrom, building 3. We are not informed what commodities, if any, are loaded or unloaded at those buildings, except that we are told that about one carload of sulphur a month is unloaded at building 3.

Next south of the elevator tracks are two tracks that diverge westward from the Chicago Belt's lead C. They run westward parallel to each other from that lead to a point about 550 feet west of building 16, where the northern one begins to cut across to the southern elevator track. Just west of that point there is also a crossover from the other track to the southern elevator track, but that track continues across the plant until it joins track 2. There are seven buildings and the reservoir that are served on the north by the southern one of those tracks, namely, from west to east, buildings 48, 74, 56, 53, 65, the reservoir, 17, and 15, and one building 16 that is served by both tracks. The photostat shows platforms running along the north sides of buildings 48, 56, and 53, and that four cars can be placed at the platforms at buildings 56 and 53.

Corn syrup is loaded in box and tank cars at building 48. Corn syrup is also loaded and unloaded into and from box cars at building 56 and into and from tank cars at building 53. Tank cars are cleaned on the same track just east of 53. Those loading and unloading points are switched from the west. There are car pullers at buildings 56 and 53. About 5 to 6 cars a week are loaded at building

56. It is physically possible to switch this track from the east, but it is impracticable to do so because of interference caused by loaded and empty cars standing at building 16. We are not informed what commodities, if any, are loaded at buildings 74 and 65, the reservoir, building 15, or the corn oil tanks, but the photostat shows that cranes owned and operated by the industry unload about one car of coal a day at building 70. At building 16 feed and meal are loaded on both of the tracks north thereof. There is one unloading spot on each of those tracks. Empty cars are placed east of these points. Nine cars can be placed on the northern track and 18 on the southern one. Car pullers are used to move the cars to and from the loading points. The capacity of each track west of building 16 is about 10 or 11 cars. Both tracks can be switched from either end. To switch the empty cars from the east, they would have to be moved from the plant yard, presumably over track 1, on to the Chicago Belt's main lead, and shoved by a reverse movement on to the track serving building 16. The loaded cars can be moved westward by using the southern elevator track without encountering interference from cars standing at buildings 48, 74, 56, and 53, or from tank cars standing east of building 53. The tracks east of building 16 would have to be clear of empty cars in order to switch the loaded cars out from the east. A similar handling of loaded cars would be necessary in order to place the empty cars from the west.

All cars moving to and from the elevator have to pass over tracks 2 and 1-B. In a distance of approximately 540 feet on track 2 there are 4 switches to the east diverging into 21 tracks serving the buildings described above, and 2 switches to the west diverging into 7 tracks. Traffic to and from all points on those 28 tracks has to pass over all or part of that 540 feet of track 2 when moving to or from the plant yard and also over track 1-B.

North of track 1, the running track between the Chicago Belt's lead in the plant yard, there are 5 stubbed tracks that diverge eastward from track 1-B. From north to the south the first one serves buildings 48, 56, and 53 on the south, at all of which there are loading or unloading points.

The second stubbed track serves buildings 45 and 46 and 10 hydrol storage tanks, at all of which there are loading and/or unloading points. The third stubbed track serves building 45 on the south and the boiler house. The 2 other stubbed tracks also serve the boiler house. About 22 cars of coal a day are used at the boiler house and about 5 or 6 cars of ashes or cinders a day are moved therefrom. The coal that moves from storage moves over track 2 and that which moves directly from the plant yard, and the cinders, must pass over track 1-B.

It is because the traffic to and from all the loading and unloading points referred to above and the fact that all inbound coal moved to storage and all tank cars moved to and from the Crystal Car Line Express' yards and shops must move over tracks 2 and/or 1-B that the prior report referred to those tracks as "the main artery of the plant system of tracks" and as a "bottleneck."

Except for one unimportant stubbed track and a stubbed track that serves the north sides of buildings 47-A and 47, at which about 14 cars a month are unloaded, and building 88, at which about 3 cars a month are loaded, the prior report describes the tracks south of those referred to above as diverging westward from leads D, E and F that in turn diverge westward from the Chicago Belt's lead into the plant. The northern one of the two stubbed tracks that diverges from lead D serves the southern sides of buildings 16 and 17. About 20 cars a month are loaded on those tracks at building 16, and about one car a day is loaded or unloaded at building 17. The other track serves the north side of building 43 where cars of feed are loaded and unloaded.

The stubbed track that diverges westward from lead E serves building 43 on the south. About 2 tank cars of crude oil are unloaded there a day. The southern one of the two parallel tracks that diverge westward from lead E is designated in the prior report and referred to herein as track 1, and as above stated is the running track between the Chicago Belt's lead into the plant and the plant yard.

The northern one of the two parallel tracks that diverge westward from lead F each serve a number of loading

and unloading points. The northern one serves the south sides of buildings 47-A, 47, 88, 29 and 27. The photostat shows that 25 cars a month are loaded at building 47, presumably on both sides, that 25 cars a month of paper supplies are unloaded at building 88, and that two cars of starch a month are loaded at building 29. The southern one of those two parallel tracks and the northern stubbed track next south thereof serve from west to east the north and south sides, respectively, of buildings 28, 40, 39, 31 and 25 and a warehouse also numbered 25. About 60 cars a month of starch are loaded at building 28 and undisclosed quantities of packaged starch and other products are loaded and supplies and bottles are unloaded at building 40. An undisclosed quantity of packaged or bagged starch is loaded at buildings 28, 39 and 25.

The track south of the stubbed track referred to next above is a stubbed track, the two having the appearance of a double track. South thereof is a through track which is the most southerly track in the plant. The latter track and the stubbed track north thereof serve on the south and north, respectively, from west to east, buildings 28, 42, 30 and 32. Building 42 is a warehouse where about 60 cars are loaded and 12 cars of containers and bags are unloaded a month. It has 7 doors on the north side and 8 on the south side at which cars must be placed. At building 30 there is a platform for 4 cars on the north and a track on which 8 cars can be placed on the south. There is a car puller to handle the cars on the latter track. Dextrine is loaded on the latter track and about a car of borax a month is unloaded on each track. The southern track is switched from the west and the stubbed track from the east. The tracks south of track 1 and all buildings served by those tracks are between the plant yard and the Chicago Belt's lead. All cars to be placed at or moved from points on those tracks move through the plant yard whether the tracks are switched from the east or west and that is the only practicable way in which the traffic can be handled.

The above description and that in the prior report of the locations of the loading and unloading points, the tracks that serve them, and of the manner in which the

switching is performed is sufficient to show that it is improbable that many of the loading or unloading points could be or are switched without having to remove and respot cars. It is impossible even when one carrier is performing all of the switching for it to do so unless all cars standing on a track serving one or more loading or unloading points are removed at one time and all cars to be placed thereon are spotted at one time. It is not alleged by either the industry or respondents that that is or can be done. The evidence introduced at the prior hearing shows that it was not done at that time. No one even contends that if each of the respondents was to switch the traffic handled by it with its own power that it could do so without encountering considerable interference and interruption caused by cars placed by the other carriers and from the other carriers' engines. In fact it seems clear that they could not do so. As pointed out in the prior report, this was admitted by a former traffic manager of the industry who emphasized his statement by saying that there is a legend that they tried it at one time and that such chaos was never seen before in the Chicago switching district. In *Standard Oil Co.* v. *Director General*, 59 I. C. C. 620, quoted with approval in *Ford Motor Co.-Terminal Allowance*, 209 I. C. C. 77, 80, we said:

> The fact that several carriers could not perform the service individually is convincing that said service is greater than the equivalent of team track or simple switching delivery, and, in fact, beyond the scope of the carriers' legal obligation.

In the prior report herein we discussed the meaning of the phrases "simple switching or team track delivery" and the "equivalent of team track or simple switch placement" as used in the original and supplemental reports in this proceeding and said those terms were intended to be a flexible guide rather than a fixed standard of measurement and as to which proof is not necessary.

The complicated design or layout of the plant in and of itself prevents the carriers individually or collectively from removing and delivering cars at the loading and

unloading points in a continuous movement without interruptions or interferences.

The industry takes exception to the following statement on page 62 in the prior report:

> The conclusion is that the yard master and his two assistants employed by the industry have exclusive control over all switching operations in the plant and determine when, where, and how, all cars shall be placed.

No other conclusion is possible from the evidence in the prior record and report if the word "how" is interpreted as excluding, which was the intent, the discretion lodged in the switching crews as to the mechanical running and handling of the engines and cars. The question here is whether the evidence at the further hearing shows a sufficient material change in those facts to warrant a modification of the findings. The substance of the testimony introduced at the last further hearing on this question is summarized next below. The contract between respondents providing that the engines while at the plant shall be subject at all times to the supervision of the yard master of the Corn Products Refining Company is still in effect. After the yard master retires and should the railroads provide one in his place, the industry contemplates telling the railroad employee "when and where and what to spot and remove." This statement was afterwards qualified by a categorical "no" to the following question by witness' counsel, "Do you through your yard master tell the railroad when to spot the cars at your buildings," and by the answer, "That is all" to the following question by counsel, "Do you do any more than to tell them at what building particular cars containing particular commodities are wanted." Those answers in turn were qualified by the statement, however, referred to above that the industry gives instructions to switch one building before another when such service is desired. The industry receives 32 or more engine hours switching services a day to meet its requirements and "is kept in close touch with the Belt officials on our [industry's] requirements." The crews now operating the switch engines have worked in the plant

for long periods of time and they are well acquainted with the manner in which the switching is performed. They receive switching orders from the industry lining up the work. They adhere to those orders and it is not necessary to tell them when to place a car unless "quicker service" is desired at a particular point. All cars are first placed in the plant yard and the Chicago Belt is not at liberty to move any of them to loading and unloading points until told to do so by the industry. The cars may be held in that yard for a period of from one hour to one day or longer before they are placed. Once in a while when a commodity may be needed as soon as it is brought into the plant yard by the Chicago Belt, that carrier, may on order of the industry, move it immediately from the plant yard to the unloading spot. A car of grain was instanced as an example of such a movement. We are not here concerned with refinements of the degree of control exercised by the industry over the switching of the plant. The extent of the industry's control is important because it affects the question whether respondents individually or collectively perform the switching without any delay or break in the time or continuity of the movement, and at the time when it is most convenient to them to do so in relation to their coordinated switching activities in the switching zone in Chicago, in which the industry is located.

The evidence given at the prior and last hearing is conclusive that the switching in the Corn Products Refining Company's plant is not so performed, that under present circumstances and conditions it is highly improbable that the Chicago Belt could so perform it and meet the industry's needs, and that interruptions and interferences now encountered by the Chicago Belt would be greatly magnified were each of the carriers to undertake to switch its own traffic.

In the prior report, at page 72, we pointed out that carriers are not under any obligation to pool switching operations to accommodate an industry when they could not individually perform the service with their own power at their own convenience and free from interference; that the fact that they have pooled such operations does not create an obligation to switch the plant that did not previ-

ously exist; and that if a carrier cannot serve a plant because of interference caused by engines of another carrier, there is no obligation on it to do so under a pooling arrangement. Those pronouncements are affirmed.

The Chicago Belt furnishes the engines and crews to switch the plant. The contract between the four carriers provides that the engines used in the plant "shall be subject at all times to the supervision of the yard master of the Corn Products Refining Company"; that the Chicago Belt shall place an engine or engines "in the service and keep the crew or crews at the plant for such time as is necessary to perform the work required"; that such engine shall be known as the "plant engine"; that each of the carriers will handle its own traffic to and from the designated receiving and forwarding tracks; that the Chicago Belt "shall act solely as the agent of the four carriers * * * in the physical handling of their business inside the plant and to and from those receiving and forwarding tracks"; that the Chicago Belt "shall not assume carrier relations to such business while being handled for the other interested carriers," and the Chicago Belt shall not be subject to the usual carrier liabilities for damages; that the total expenses for the plant engine or engines shall be $10 per engine-hour for the actual number of hours for straight time the engines are in the plant and for overtime at the same rate plus overtime rate of pay for train and engine crews; that the industry's yard master shall approve time and overtime for crews; and that the expense of the plant engines, after deducting revenue earned from intraplant switching and weighing, shall be paid by the four carriers on the basis of the total number of loaded cars received and forwarded by each.

Arguments are presented, some of which were considered and found without merit as long ago as 1908 in *General Electric Co.* v. *New York, C. & H. R. R. Co.*, 14 I. C. C. 237, and others in the original and supplemental reports in this proceeding. It is sufficient to say in connection therewith that it is an abstract truism that the mere size of an industry, or the fact that it is served by one or more carriers, is not sufficient on which to base a finding that the line-haul rates do or do not include the

delivery and receipt of freight at loading and unloading points within the plant, and that comparisons of switching single or small facilities with theoretical divisions of complex industrial plants are unreal and unsubstantial and have no relevancy to the issues in these proceedings. Even if those and similar arguments ever had any substance they do not now for Agent R. G. Raasch's tariff I. C. C. 600 to which the Chicago Belt, Baltimore & Ohio Chicago Terminal and the Indiana Harbor are parties, and Agent B. T. Jones' tariff I. C. C. 4002, to which the Alton is a party, which became effective January 1, 1946, definitely prescribed rules and regulations governing the receipt and delivery of cars of freight on, to, and/or from private and industrial sidetracks subject to some exceptions not here material. That tariff was originally filed July 6, 1945, and refiled September 28, 1945, to become effective November 1, 1945. The second tariff did not make any substantial changes

> in the rules and regulations. The effective date was voluntarily postponed until January 1, 1946. At the last further hearing the parties, at their request, were authorized to refer to that tariff and it was agreed that we should take official notice of it should it become effective.

That tariff is applicable at the Corn Products Refining Company's plant at Argo. On December 5, 1945, the industry filed a petition seeking suspension thereof on the ground that the rules might be interpreted as providing for charges in addition to the line-haul rates at its plant and because it was alleged the rules do not clearly and unambiguously carry out what the industry conceives to be the purpose of the tariff, namely, of providing for free switching service at its plant and others where similar conditions exist. On January 15, 1946, the industry filed a petition which was denied February 4, 1946, seeking the discontinuance of this supplemental proceeding alleging that the situation has been entirely changed and that the ultimate issue in this proceeding of where the line-haul rates begin and end no longer exists. The industry

contends that we can not deal with any questions as to the legality of the services now being rendered at its plant in this proceeding, but that we must do so only in "a proceeding involving the tariff." We held a further hearing to determine the legality of the switching services and found them unlawful. On petition of the industry, the proceeding was reopened and a further hearing was held to determine the same question. As the prior findings are affirmed herein, we not only have authority to, but it is our duty to see that the unlawful practice is discontinued. It may not properly be contended that we are deprived of jurisdiction to determine an issue pending before us by the filing of a tariff or that the filing of the tariff automatically requires the institution of another proceeding. The most that can reasonably be said is that if the tariff and our findings are in conflict, we should order the tariff cancelled or modified. As shown by what has been said above, all parties had a full opportunity to deal with the proper interpretation of the tariff in their briefs and at the argument. The industry and respondents, with full knowledge of the tariff provisions, presented all of the evidence they desired. Therefore, a further hearing would serve no purpose. It is appropriate, however, to interpret that tariff as it applies to the industry under consideration.

The rules and regulations contained in that tariff were intended to be, and they are, in full accord with the principles laid down in the original and supplemental reports in these proceedings, except that Rule III contains new and additional provisions not heretofore considered. Rule I applies to the delivery and removal of cars of freight on privately-owned side or industrial tracks near and connecting with the carrier's tracks, or in other words, what has been referred to in these proceedings and in the prior report in this supplemental proceeding as "simple switching delivery" or "simple switch placement." It does not apply to an industry such as the Corn Products Re-

fining Company's plant which has a complicated system of about 23½ miles of track covering 200 acres.

The first part of Rule III and section (a) thereof reads as follows:

> When receipt or delivery of a car or cars as provided in Rules I and II cannot be accomplished in continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions:
>
> (a) If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held, a charge of $1.00 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

It will be noted that the rule applies only when "the delay will be of a temporary nature." That phrase means when the delay is due to an unusual, infrequent, occasional, and not reoccurring cause which is of limited duration. The rule does not apply to delays or interferences or interruptions that are inherent in or arise repeatedly out of industrial operations or the inadequacy or complexity of plant tracks or facilities. It provides charges for delays not heretofore considered in these proceedings and in no way modifies or enlarges the carriers' obligations as heretofore determined in these proceedings. Rule III has no application to the situation at the Corn Products Refining Company's plant.

Rule II is the only one of the rules in that tariff with which we are here directly concerned. That rule reads as follows:

> Except as otherwise provided in Rule III, cars covered by Rule I will be received and delivered at loading and unloading stations on tracks designated by

the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes 1 and 2, provided the locomotives in general use for switching in the vicinity of the plant site can safely operate over the tracks within the plant site.

Note 1. "Continuous movement" means a movement between the carrier's tracks and the loading or unloading locations, a hold track or tracks, or other place where cars are received or delivered without any delay or any suspension or break in time, or continuity of the movement due to any circumstances or condition for which the industry is directly responsible.

Note 2. "Ordinary operating convenience" means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arrives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.

When considered in connection with Notes 1 and 2, the rule seems to be clear and unambiguous. It may be, however, that the interpretation of two phases of Note 1 will be helpful. Attempts have been made in the past to interpret the phrase "for which the industry is directly responsible" and words of similar import as requiring some specific order or affirmative act by the industry. For example,

the contention has been made that if the industry says to the carrier "there is the plant, switch it," that the industry is not responsible for interference or interruptions caused by the movement of intraplant or intrastate traffic, but that the carriers are responsible for such interference. The proper interpretation of that phrase is that the burden is on the industry to furnish adequate tracks and facilities for the performance of the switching in its plant and that it is directly responsible for all circumstances and conditions that interfere with or prevent a continuous movement except such as are due to war, insurrection, and what are usually accepted and referred to as Acts of God, or where the carrier may, at its option, avoid such interruptions or interferences, but fails to do so.

We affirm the findings in the prior report. An appropriate order will be entered.

SPLAWN, *Commissioner*, concurring in part:

In this report there is some discussion which appears to me to be not material or relevant and rather theoretical. For example, the reference to the impracticability of an individual line doing its own switching does not seem to me to be responsive to the issues in this proceeding. It must be conceded that in a great terminal like Chicago a terminal switching company will do much of the switching for the several line-haul carriers. But regardless of those arrangements which are not in issue here we have the question as to where the duty of the carriers ends or begins. Since the hearing a tariff has become effective which seeks to define the extent of the switching in official territory and the conditions under which it is to be performed as an incident to line-haul transportation. It seems to me that a further hearing is necessary to determine in what respect that tariff is lawfully applicable.

ALLDREDGE, *Commissioner*, dissenting:

In view of the changed circumstances brought about by the filing of the switching tariff mentioned in the report, it seems to me that the approach by the majority to the disposition of this proceeding is erroneous. In my opinion

the issues should now be considered as redefined or remodeled by this tariff and they should be determined by the application of the rules and regulations contained in the tariff to the factual situation as it obtains at the plant in question. If these rules and regulations are in any wise inadequate, unreasonable or otherwise unlawful full power rests in us to have the tariff amended.

The tariff contains rules governing the receipt and delivery of freight, with certain exceptions, at industrial tracks throughout official territory. The exceptions do not include the private or industrial tracks at the Argo plant of the Corn Products Refining Company. While it is first stated in the report that the tariff applies at the Argo plant, this assertion is negatived upon later consideration of the individual rules contained therein. The ultimate result of the construction placed upon the language of the tariff is that it is rendered inapplicable not only at the particular plant here considered but, by inference, also at all other plants of comparable character in official territory.

Unfortunately, the record is lacking in a description of the background of this tariff and of the purposes of its framers, which, of course, constitutes a good reason to refrain from the sweeping generalizations made in the majority report. The interpretation placed upon the tariff is erroneous on its face. Rules I and II are correlative and state that cars will be placed on privately-owned sidetracks or industrial tracks near and connecting with the carrier's tracks without any additional charge where the conditions of operation are not unsafe and where the carrier can perform the switching service at its ordinary operating convenience and when the service can be ordinarily performed in continuous movement. Rule III states the conditions under which terminal switching service at private or industrial tracks will be performed when interruption or interference are encountered. I quote below this rule in full because it apparently governs at least a part of the switching service at the plant here under consideration:

> When receipt or delivery of a car or cars as provided in Rules I and II cannot be accomplished in

continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions:

(a) If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held, a charge of $1.00 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

Charges will be assessed in accordance with the next preceding paragraph when delays encountered during a locomotive trick or shift aggregate more than 30 minutes.

(b) If, after a reasonable period of delay, the obstruction or condition preventing completion of service has not been removed or eliminated the carrier may, at its option, withdraw its locomotive and place the car or cars on a hold or other available track or tracks within, or without, the industry plant site. Charges for the delay encountered shall be computed in accordance with paragraph (a). Subsequent movement by carrier locomotive of the car or cars from the hold or other track or tracks to actual point of delivery will be subject to a charge of $3.47 per car.

(c) For the purpose of applying the provisions of paragraphs (a) and (b) time shall commence to run from the minute the conductor determines that the shipper or consignee is unable to accept service.

It is apparent that there is nothing in the terms of the foregoing rule that justifies the interpretation placed upon it by the majority report.

It is a well-settled legal doctrine that a tariff which has been filed with the Commission has the force of a statute. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S.

184. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516. However, the industry switching tariff above considered, which, as stated, is published for application throughout official territory, is in effect made unenforceable and ineffectual by the majority decision.

Before a final disposition of this proceeding is made complainant's request for a further hearing should be granted in order that it may be given an opportunity to present the facts necessary for a proper interpretation and application of the governing tariff.

I am authorized to state that Commissioner Mahaffie joins in this expression.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1309

CORN PRODUCTS REFINING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Statement

Appellees' motion to affirm, filed pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, was received by appellant on April 14, 1947.

It is submitted that appellant's jurisdictional statement which sets forth the principal issues involved and the grounds upon which it is contended that the questions presented are substantial, should demonstrate that the motion to affirm should be denied or at least that action thereon should be deferred until after briefs, argument and consideration of the case on appeal. However, some further amplification may be helpful to the Court and, therefore, pursuant to the permission accorded by paragraph 3 of Rule 12 and paragraph 3 of

Rule 7 of the Revised Rules of the Supreme Court, this brief is filed in opposition to the motion to affirm.

The Case

Appellant brought this suit seeking a review of and a decree setting aside, annulling and enjoining enforcement of an order of the Interstate Commerce Commission.

The proceeding before the Commission involved the switching of cars by railroads, respondents in the investigation, to and from points of loading and unloading in appellant's plant at Argo, which is within the terminal and switching district of Chicago.

The line-haul rates charged for transportation to and from appellant's plant are the Chicago rates; namely, the same rates which are charged for the transportation of similar freight to and from all team tracks, termini and industries within the Chicago terminal area. Appellant's plant was constructed and began operations in 1910. Continuously from that time the railroads have performed the spotting of cars at points of loading and unloading in the plant at their line-haul rates without added charge, the Chicago line-haul rates being regarded by them and by appellant as covering this service and including compensation therefor.

Following its basic report in *Propriety of Operating Practices—Terminal Services,* Ex Parte 104, Part II, 209 I. C. C. 11, in which it announced certain general rules or standards to be employed in determining the extent of carriers' obligations under and the services for which they are compensated by their line-haul rates, the Commission in 1931 and 1932, in one of its supplementary proceedings, held hearings and received evidence with regard to switching at appellant's plant. The Commission evidently determined that the line-haul rates covered the spotting service because it entered no order requiring a change in practices. Thereafter, for eleven years, the situation continued as it had been from the opening of the plant. However, in 1943 the Commission suddenly announced further

hearings. Following these hearings it made a report in which, despite the years of contrary practice and its own previous action, it held that the railroads were not compensated by their line-haul rates for spotting cars and that, although they performed the service, the transportation covered by their line-haul rates did not extend beyond certain tracks in appellant's plant enclosure and certain other tracks in a railroad yard entirely outside the plant. On appellant's petition for reconsideration, a further hearing was had in 1945, after which the Commission affirmed its prior decision and made the order attacked in this suit.

The order would require the railroads to cease from the services performed by them for over 35 years and would prohibit them from switching cars beyond the points designated by the Commission unless an added charge should be paid to them for so doing. It is estimated that the additional charges would amount to several hundred thousand dollars annually, not demanded of any other industry, large or small, in the Chicago terminal area where the railroads perform the switching.

Without recounting at this time all that transpired at the hearings before the Commission, the record in which will be before the Court, it is sufficient to say that both investigators for the Commission and witnesses for the railroads testified that the switching at appellant's plant was and had always been performed by the railroads; that it was done efficiently and economically from a railroad standpoint; that there were no material interferences with the railroads' performance of the operations at their own operating convenience; that in switching cars the railroads were not controlled or directed by appellant or prevented by conditions in its plant from spotting cars at their own railroad operating convenience; and that the line-haul rates were intended to compensate the railroads for the spotting service.

At these hearings further evidence was offered both by appellant and respondent railroads which the Commission refused to receive and consider, which would have shown, in substance:

(a) That the practices at appellant's plant as to switching and charges were in all respects similar to those, not at a few competing plants, but at every other industry, large and small, in the Chicago area where the railroads perform the switching; that at every industrial plant in Chicago where the railroads do the switching the Chicago line-haul rates were treated as covering the service of spotting cars and as including compensation therefor to the railroads; that at no industry in the Chicago area where the railroads perform the service was a charge therefor made in addition to the line-haul rates; that the Chicago rates were constructed with this very idea in view; that the cost of switching at appellant's plant was examined and taken into account in arriving at the rates; that the same situation obtained at all industries in all other large terminal areas where the railroads performed spotting; "that throughout the country it is the general practice that the line-haul rate includes, without additional charge, the placing or spotting of cars at points of unloading, or the removal of cars for [from] points of loading at industry tracks, and that the general practice is to make no additional charge in addition to the line-haul rates for that service, and that this is so regardless of the amount, quantum or cost of the particular service of spotting or placing cars, the size of the industry involved, the number of tracks used by the industry, regardless of the number of cars placed or spotted, and also regardless of whether the track is an industry track or a team track, the sole exception being when the industry itself, for reasons of its own, elects to perform its own switching and spotting rather than permit the railroads to do so"; and that to require the railroads to make an additional charge for switching at appellant's plant or compel them to discontinue service beyond railroad yards outside the plant or designated points within the plant would impose upon appellant charges not paid by any other shippers or industries paying the same rates and would deny to appellant

services customarily afforded to all other industries and shippers, large and small, including those located in the Chicago area and paying the same line-haul charges.

(b) That the services involved in switching cars to and from points of loading and unloading in appellant's plant were less and involved less interference than the switching of cars to and from team tracks and other industries, large and small, in the Chicago terminal area subject to the same line-haul freight rates.

The refusal of the Commission to receive and consider this evidence constitutes one of the grounds of attack upon the order.

Another question arises because the Commission in its report and as the basis of its order made findings not supported, as appellant claims, by any evidence which was received but which, instead, were in direct conflict with and in complete disregard of uncontradicted evidence of informed witnesses whose competence was not challenged. For their testimony the Commission substituted its own impressions without support in the evidence but based upon what the presiding Commissioner referred to as the Commission's "informed experience".

On both of these points the lower court ruled that the Commission's action was sustained by the decisions of this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and other decisions involving orders of the Commission in investigations as to switching at other industrial plants and particularly the payment of allowances by the railroads to industries where the railroads were not permitted by the industries to do the switching beyond certain interchange tracks, a situation unlike that at appellant's plant and most industries.

Another ground of appellant's attack upon the Commission's order involved a matter which was not claimed by appellees to have any relation to the decisions cited. This arose from the fact that during the pendency of the present

proceeding before the Commission the railroads filed a new tariff schedule, for the first time specifying with considerable particularity the circumstances under which charges in addition to their line-haul rates would be made in connection with the switching of cars at industrial plants. The effect was that except in the circumstances specified in the schedule no charges in addition to the line-haul rates should be made. By its terms this tariff, referred to here as the Raasch tariff, was made applicable to switching at appellant's plant. The Commission allowed the tariff to go into effect. The appellant argued that it disposed of the matter under investigation because by its provisions the extent of the terminal services covered by the line-haul rates was no longer a matter of inference or for determination by the Commission on the basis of the standards previously employed, since after the tariff became effective additional charges could lawfully be collected only in accordance with and under the conditions specified in the tariff. The Commission, however, although finding that the tariff was applicable at appellant's plant and although its provisions were not found to be unreasonable or otherwise unlawful, ruled that the tariff was inoperative at appellant's plant, apparently because its provisions were contrary to the views of the Commission as to the circumstances under which additional charges should be made.

The lower court upheld the Commission's action without opinion, merely adopting its conclusion.

The Major Issues Presented by the Appeal

There are, therefore, three major issues presented by the appeal. Following the order of the argument in support of the motion to affirm, these questions may be restated as follows:

1. Whether the Commission erred, acted arbitrarily and unlawfully and denied a fair hearing in refusing to receive and consider a large amount of evidence offered by appellant and the railroads, and whether the lower court erred in upholding the Com-

mission in this respect. This general question is to be divided into three parts:

(a) Whether because this Court in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402, and allied cases, upheld orders of the Commission in various proceedings directing the railroads to cease paying allowances to industries doing their own switching,* and because, in the course of its opinion it stated that it did not appear from the evidence then before it that there was a custom or practice that the railroads' obligation under the line-haul rates included the service of spotting cars, the Commission may forever thereafter in other proceedings involving other industries and other rates refuse to accept evidence proving that such a custom or practice actually does exist where the railroads themselves perform the switching. Accepting the evidence tendered in this proceeding as true (and the correctness of the facts sought to be proved thereby has not been challenged), the real question is whether under the circumstances stated an assumption contrary to the real facts is to be forever perpetuated so that it may be invoked against an industry where the railroads have always, under their line-haul rates, switched cars to and from points of loading and unloading.

(b) Whether in applying one of the standards announced by the Commission in its basic report,

* In all of the cases, with one exception, which came before this Court, the railroads paid or had paid allowances to shippers, doing their own switching, as distinguished from the situation at appellant's plant where from its inception the railroads have always performed the spotting of cars with their own power and crews and at the line-haul rates. In the single exception, *Weirton Steel Company Terminal Allowance*, 209 I. C. C. 445, the Commission's report indicates that the industry had its own locomotives and did a part of the switching and the industry agreed that it would not meet its needs to have the spotting performed by the railroad on a regular schedule, facts which are not present here.

209 I. C. C. 11, for determining whether the switching service at a particular industry is included within the railroads' obligation under their line-haul rates and is compensated for thereby, namely, whether the service is in excess of "team track delivery or simple switch placement", the Commission may refuse evidence as to the service which constitutes team track delivery and simple switch placement under the particular rates paid by the industry.

(c) Whether when the issue is as to the extent of the service contemplated by and for which the railroads are compensated by the line-haul rates the Commission may refuse evidence that the cost of the switching service in question was computed for the purpose of and was considered in fixing the rates charged.

2. Whether in the face of affirmative and uncontradicted evidence by competent witnesses, including the Commission's own investigators called as witnesses by its counsel, (a) that there are no material interferences by the industry or by conditions in its plant with the switching of cars by the railroads at their railroad operating convenience; (b) that the industry does not direct or control the performance of switching by the railroads or dictate the time and manner in which switching shall be conducted; and (c) that the line-haul freight rates were intended to and do include compensation to the railroads for the switching of cars to and from points of unloading and loading, the Commission, without contrary testimony and solely on the basis of its "informed experience" and an examination by it of blueprints, may make directly contrary findings.

3. Whether the Commission may treat as wholly inoperative and not binding upon the railroads or the appellant a tariff schedule which by its terms is ap-

plicable at appellant's plant and defines the circumstances under which charges in addition to the line-haul rates will be made in connection with the switching of cars, which shedule has not been ordered cancelled or held to be unreasonable or discriminatory or otherwise in violation of the Act.

It is believed that these questions are of sufficient substance so that the Court should not affirm forthwith, but should hear argument thereon, receive briefs and examine the record. In case further demonstration of the substantial nature of the issues is needed, the following argument is submitted.

Argument

Rule 7, paragraph 4 of the Revised Rules of this Court, provides that

> "The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

It is not suggested, nor could it be, that this appeal was taken for delay.

Appellees' argument is in effect that the issues presented by the appeal have been settled by prior decisions which leave no questions here of fact or law, so that justice will be done by affirmance of the judgment below simply upon the authority of such prior decisions. It is submitted that such is not the situation.

POINT I

On the first major question, whether the Commission erred in refusing to receive and consider evidence and denied a full and fair hearing, the decisions of this Court in the *Tin Plate* and allied cases do not afford authority for affirmance of the judgment below without consideration of the record, briefs and argument.

Appellees' main argument in support of their motion to affirm is that this Court's decisions in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402, *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, *Inland Steel Co.* v. *United States*, 306 U. S. 153, *United States* v. *Wabash Railroad Co.*, 321 U. S. 403 and allied cases did not leave open thereafter as issues of fact subject to proof, the questions to which the evidence offered and excluded by the Commission was addressed, and that these decisions sus-

tain the Commission's action in refusing to receive and consider the proof which was tendered and excluded. It is submitted that the decisions do not have, and in the interest of justice and reality should not be held to have, the effect claimed for them.

A. As to the exclusion of evidence to show custom and the practices of the carriers under the particular line-haul rates involved.

The decisions relied upon by appellees cannot afford precedent justifying affirmance of the judgment below forthwith and without argument and consideration of the record unless approval by this Court of the Commission's decisions and orders there under review established, as a matter of law, which could never thereafter be controverted by proof of facts, the proposition that by practice or custom the line-haul rates for transportation to and from Chicago do not include compensation to the railroads for switching cars to and from points of unloading and loading at industrial plants in the Chicago terminal area, where the railroads perform and always have performed this service, and that the railroads' undertaking under these rates does not embrace such service.

That to give these decisions such effect would be wrong is forcefully demonstrated in this proceeding, because if the evidence which appellant sought, and was not permitted, to present was correct, it would mean perpetuating as an uncontrovertible proposition or presumption something which is contrary to the real facts. For, as has been stated, the evidence offered by appellant included the testimony of railroad witnesses and the testimony of a recognized expert in the transportation field, who had made a study of the facts with regard to the practices of the railroads, whose competence and credibility were not challenged in any respect, that a general and, indeed, universal practice exists that under the Chicago rates without added charge the railroads have always performed the spotting of cars at all industries, large and small, where they do the switch-

ing as they do at appellant's plant, that the line-haul rates were designed to include this service, and that a similar practice exists at other terminal areas throughout the country. At no time during the course of the proceedings before the Commission or of the proceedings in this suit has it been suggested by appellees that the real facts were otherwise than as would have been disclosed by the evidence which was excluded.

Counsel for appellees, in urging their motion to affirm, are, therefore, in the position of arguing that because in earlier cases the Commission was upheld in concluding that proof had not there been presented to sustain a finding that the particular line-haul rates involved included compensation for spotting where the industries performed the service, in whole or in part, future cases must be decided on the assumption, contrary to evidence which is available and presented, that all rates are treated by the railroads, as a matter of practice and custom, as not including compensation for spotting service when performed by the railroads, and that there is no practice or custom pursuant to which the railroads, under rates such as those for transportation to and from Chicago, spot all cars at all industries where they perform the work at the line-haul rates without additional charge. We do not believe that the decisions sustain, or that this Court intended them to be used to perpetuate, a fiction in the face of available evidence.

In the *Tin Plate* case, the Court said (pp. 409-410):

> "It is asserted by the appellees that it has become customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The record fails to establish any such custom."

Thereafter, in its opinion, in discussing the practices of the carriers in paying allowances, the Court said:

"There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

Appellees argue that these expressions justify the refusal of the Commission in this proceeding to receive the evidence described. Plainly, however, this Court was there treating the issues as questions of fact and stating only its conclusion upon the records in those proceedings.

Here appellant endeavored but was not allowed by the Commission to create a record of evidence which would overcome the very deficiency which the Court noted in the evidence in the *Tin Plate* case, and would establish the existence of such a custom or practice in the Chicago terminal area and under the Chicago line-haul rates which are charged on shipments to and from appellant's plant. The proffered evidence, as has been said, would have shown that at every industry, large and small, within the Chicago terminal area where the railroads perform the spotting, it is and always has been the practice and custom of the railroads to switch cars to and from points of loading and unloading at the line-haul rates and to treat those rates as covering and including compensation for the service.

The *Pan-American Corporation* case involved orders of the Commission requiring carriers to cease and desist from paying allowances to the industries which were doing their own switching. There was present no question as to whether the line-haul rates included compensation for spotting when performed by the railroads themselves. The Court held simply that it was of the opinion that there was substantial evidence to support the Commission's findings. Certainly this does not mean that in other proceedings parties may not introduce evidence which might lead to contrary findings. Indeed, the fact that the Court took jurisdiction to hear the case and review the record lends support to appellant's contention that it is entitled to have a similar review here.

The *Inland Steel Company* case was likewise an allowance case. The Commission had found in that case that the industry "was performing this plant service for its own convenience", that under the circumstances the service was one which the railroad was under no obligation to perform, and that consequently the allowance paid to the industry by the railroad was unlawful because "the allowance was paid for service for which the railroad was not compensated under line-haul rates" (page 154). This case is certainly not a precedent for excluding evidence designed to show that the service performed at appellant's plant is a service for which the line-haul rates provide compensation to the railroads or for upholding an order of the Commission made in disregard of uncontradicted evidence to this effect.

United States v. *Wabash R. Co.*, 321 U. S. 403 (the *Staley* case), likewise affords no support for appellees' motion but, on the contrary, presents strong reasons for the Court to entertain the appeal and consider this case on its merits. Unlike the situation in the present case, the Staley Company had previously done its own switching between an interchange track and points of loading and unloading and had received an allowance from the railroads. The Commission ordered the railroads to cease paying the allowance. The railroads then took over the switching and made an extra charge therefor, thus treating the particular line-haul rates there involved as not covering the service. The case came before this Court for review of an order of the Commission declining to permit the railroads thereafter to discontinue the collection of this additional charge.

It is recognized by appellant that the decision in the *Wabash* case, which was announced after the 1943 hearings before the Commission in regard to switching at appellant's plant, sustains the Commission's action in excluding certain evidence which was offered by appellant to support the contention that since the railroads switched cars to and from points of loading and unloading in the plants of several of appellant's competitors without making any charge in addition to the line-haul rates, an order of the Commission requiring this appellant to pay an added charge would be

invalid because it would discriminate against it and in favor of such competitors. But the evidence, whose exclusion is here alleged to have been erroneous, is of a different sort and was addressed to a different and broader issue, namely, the basic question whether by custom or practice or definite intention the line-haul rates to and from Chicago include compensation for spotting cars at all industries, including appellant's plant, within the Chicago terminal area where the railroads perform the service. On this point the decision in the *Wabash* case sustains appellant's position. This is clear from the Court's opinion and its approval of the standards or tests laid down by the Commission in its basic decision, 209 I. C. C. 11, for determining the services which are covered by the line-haul rates of the railroads and the performance of which, without added charge, is therefore in accordance with Section 6 of the Act. The Court stressed that the question as to the point at which a carrier's transportation service under its line-haul rates begins and ends is a question of fact (p. 408). One of the tests stated by the Commission is whether the "form of delivery is customary" (209 I. C. C., p. 18). Since this is a question of fact, it is obviously one to be decided in accordance with evidence, and evidence as to what is customary and as to the usual practice of the railroads under the rates involved is not only relevant but necessary.

It is difficult to imagine evidence more directly addressed to this issue and bearing more convincingly upon the question whether rates include compensation for switching service, especially realizing that the rates involved are the line-haul rates to and from Chicago, than proof that at every industry in the Chicago terminal area, large and small, including industries larger than appellant's, with greater opportunities for interferences and costly switching, where the railroads themselves perform the switching to and from points of loading and unloading, the Chicago line-haul rates are treated as including compensation therefor because the service is performed at those rates without additional charge. Less directly related but equally relevant on the

question of general custom and practice and as showing that the practices at Chicago and the undertakings and obligations contemplated by the Chicago rates were not unusual but were in conformity with the general rate structure of the country, was the tendered proof that at every important terminal area, where there were large as well as small industries, the railroads, where they performed and always had performed the switching of cars to and from points of loading and unloading, as they always have at appellant's plant, do so at the line-haul rates without added charge; and the further evidence that it was one of the basic theories of the rate structure of the country that where the railroads themselves perform terminal services, the rates should include compensation for all service to and from points of loading and unloading, regardless of the nature and extent of the particular terminal operations involved. Such evidence is far different from evidence designed to show discrimination as between individual plants which this Court in the *Wabash* case held to be irrelevant.

It is one thing to hold that a shipper or industry receiving an allowance or a service not accorded to shippers generally and therefore not covered by the line-haul rates paid may not assert, as a defense to an order requiring the railroads to conform their practices to their line-haul rate tariffs, that some other and competing shipper or industry is receiving a like preference. It is quite another thing, however, to hold that the Commission may refuse to receive evidence as to what the services are which are customarily rendered to *all* shippers and industries under the line-haul rates involved.

In the present case, counsel for appellees, in opposing deferment of the Commission's order, represented to the lower court that the order was intended to prevent appellant from continuing to receive "a preferential service not accorded to shippers generally." The quoted language was used by this Court in its opinion in the *Wabash* case. The very purpose of the evidence offered by appellant and the railroads and rejected by the Commission was, how-

ever, to show that the service which appellant was receiving was NOT "a preferential service not accorded to shippers generally" but, instead, was a service similar to that accorded to shippers generally paying the same rates and, indeed, less than that accorded to many. It is hard to believe that it was the intention of this Court to afford precedent which would sustain the Commission in refusing to receive evidence that similar or greater services were accorded by the railroads under their line-haul rates to shippers generally and then, having excluded such evidence, in finding that the services accorded to appellant were in excess of services accorded to shippers generally.

Finally, it may be remarked that when appellees assert that this is "merely another of these supplemental proceedings in Ex Parte 104", they fail to tell the Court that in 1932 and 1933 in this supplemental proceeding the Commission investigated and took testimony regarding the spotting of cars at appellant's plant, which evidence showed that since the construction of the plant in 1910 the railroads had performed the spotting at the line-haul rates without additional charge and the Commission evidently then concluded that no violation of the Act was shown and that the line-haul rates included the switching service. And appellees fail to tell the Court further that the evidence at the further hearings in 1943 and 1945 indicated no change in the practices or conditions at appellant's plant from those shown eleven years before.

It is submitted, therefore, that the decisions relied upon by appellees do not afford controlling precedent clearly justifying the Commission's action in excluding the evidence offered and do not leave the question raised by the appeal which is here discussed "so unsubstantial as not to need further argument" (Rule 7, paragraph 4). And if some of the language in the opinion in the *Wabash* case or in one of the other cases may appear to lend support to the interpretation of this Court's decisions placed thereon by appellees and by the Commission, the present appeal affords an opportunity to the Court to clarify the situation.

For with all respect, it is submitted that it is neither sound nor in the broad public interest that decisions of this Court may be interpreted as perpetuating for all time and as the basis for any future proceeding which the Commission may see fit to institute with respect to an individual industry, an assumption contrary to the real facts without opportunity to present evidence as to what the practices and nature of the rate structure of the railroads really are.

B. As to the Commission's refusal to receive evidence concerning team track and industry switching in the Chicago terminal area under the Chicago rates.

In its basic report (209 I. C. C. 11) the Commission stated as one of the important tests for determining the extent of service embraced within the obligation of the railroads under, and compensated for by their line-haul rates, whether the particular service is or is not in excess of "team track delivery or simple switch placement". The line-haul rates here involved were the Chicago rates and in order to give the Commission an evidentiary basis for the application of this test and for the determination of what was plainly a question of fact, appellant and the railroads offered to show the nature of and the services which were involved in "team track delivery or simple switch placement" under the Chicago line-haul rates. The Commission refused to receive this evidence. Appellees argue that here again prior decisions of this Court excused the Commission for its refusal. In a footnote an attempt is made to state what is meant by the terms "simple switch delivery" and "team track delivery", as though team track delivery were a standard term describing the same thing in Chicago as at a rural station. But plainly this is not so. What team track delivery and simple switch placement are in a large terminal area and what they are at a small station are, in each instance, questions of fact susceptible of proof, especially when particular line-haul rates are involved. And it is believed that the matter was so regarded by this Court.

In concluding its opinion in the *Tin Plate* case, the Court, while saying that "The Commission properly held that each case must be decided upon the circumstances disclosed" (page 411), went on to say that in each of the cases under review "the Commission found, *upon sufficient evidence*", that the service involved in spotting cars at points of loading or unloading within the several industries "called for excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur". The Court then remarked that it was unable "to say that the findings in respect of the individual plants lack support in the evidence" and that, therefore, the Court was "bound to accept them and to hold the orders lawful" (page 411). This is certainly far from a decision that in an individual case the Commission may refuse to receive evidence as to the service involved "in team track spotting or spotting on an ordinary industrial siding or spur" in the terminal area in which an industry is located under line-haul rates paid by the industry involved, and then on the basis of its privately held conception of what team track delivery or simple industry switching is, may decide that the spotting of cars at the industry is in excess thereof.

Again, in the opinion in the *Wabash* case, the Court said that "the point in time and space at which a carrier's transportation service ends is a question of fact" (page 408), and that the Commission's "findings on that question will not be disturbed by the courts if supported by evidence" (page 408). But it certainly did not hold that the Commission could refuse to receive evidence and then make a valid finding based on its "informed experience" without evidence relevant to a determination of the factual question.

Under the circumstances, it is submitted that on both phases of the first major question raised by the appeal, the Commission's order and the judgment of the lower court upholding it cannot properly be affirmed simply upon the authority of the previous decisions cited in appellees' motion, and that, therefore, the case is one calling for consideration of the appeal by this Court upon the merits.

POINT II

The question whether the Commission decided arbitrarily and contrary to credible and uncontradicted evidence calls for consideration on the merits.

Even if, on some theory, the decisions of this Court relied upon by appellees had the effect of converting issues of fact into either conclusive and indisputable presumptions (contrary to the real facts) or into propositions of law, so that the evidence which was offered and which the Commission refused to receive and consider was properly excluded because addressed to an issue no longer open, nevertheless there remain for decision on this appeal the two other major questions previously described. As to these certainly the cases cited do not afford controlling authority for affirmance without consideration on the merits.

One of these questions is whether the Commission's findings and conclusions were, as appellant alleges, without support in the evidence which was received and were arbitrary and unlawful because contrary to and in disregard of uncontradicted evidence of competent and credible witnesses. These are issues which can only be determined, in fairness to appellant, upon a consideration of the record and after brief and argument upon the merits. Certainly the statements in appellees' motion as to the Commission's findings and the alleged support therefor in the record should not be accepted without an examination of the record itself. Appellant challenges these statements, but extended discussion thereof would involve argument on the merits and upon the record which is not appropriate at this time.

It is sufficient here to say that this question arises in connection with the Commission's apparent application here of the test referred to by this Court in the *Wabash* case (p. 407) that the line of demarcation of the service covered by the line-haul rates should be drawn

"at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant".

Whether this is an appropriate test in a case such as the present as distinguished from an allowance case is a question which need not be argued now. Here the railroads perform the entire service of switching to and from points of unloading and loading. Whether they do so at their "ordinary operating convenience" or the point, if any, at which they are prevented from so doing are certainly questions of fact. And being questions of fact, if the right to a hearing is to be preserved, they may be decided only in accordance with the evidence produced at the hearings.

Appellant alleges that the Commission did not decide in accordance with the evidence, that it completely ignored uncontradicted evidence and made findings contrary thereto. Whether or not it did so certainly presents a substantial question which should not be decided without examination of the record, receiving briefs and hearing argument.

In their motion, appellees assert (page 7) that appellant's contention "resolves itself into a quarrel with the Commission concerning not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from competent and undisputed evidence which the record does contain." This is a strange characterization of appellant's contention, as the following few examples will indicate.

Thus, one of the Commission's own investigators testified that he had found no restrictions on the hours when switching could be done by the railroad (R. 587).* The railroad's superintendent testified that appellant had issued no instructions and placed no limitations upon the railroads as to the times for switching cars (R. 50). The rail-

* Figures preceded by "R" refer to pages of the stenographic minutes of the hearing before the Commission which are in the record herein.

road's superintendent testified also that the desires of appellant did not prevent the railroad "from spotting cars or removing cars or conducting your switching operations to and from the Corn Products plant in the manner in which your railroad as a railroad would like to do" (R. 1380). Again a witness for appellant testified that there was no instruction from appellant that prevented the railroads from switching cars in appellant's plant at their convenience (R. 106). There was other testimony all to the same effect with no contradiction whatever. The Commission, however, found that appellant issues orders "when to spot cars" (Petition p. 76) and that the railroad "is not at liberty to move any of them [cars] to loading and unloading points until told to do so by the industry". If the Commission makes a finding directly contrary to the undisputed evidence, can it fairly be said that challenging that finding is quarreling with the weight to be given to the "undisputed evidence."

Again the Commission found and predicated its decision in large part upon its finding of various "interruptions or interferences encountered in the switching operations" (Petition p. 75). The evidence on the question of interruption and interference included testimony of one of the Commission's investigators that "the switching was done promptly and efficiently" (R. 631); testimony of another of the Commission's investigators that he had nothing to offer criticizing the operation from a railroad standpoint (R. 660); testimony by another that the lifting of certain bridges which the Commission found to constitute interference actually interfered "very little" with the railroad operations (R. 632); testimony by the operating superintendent of the railroad that such minor delays as there were, were not serious and that he, himself, from a railroad standpoint had nothing to criticize in the operation (R. 1345). Between the hearing before the Commission in 1943 and the further hearing in 1945, the evidence shows that all of the delays caused by bridges and by other factors, cited and magnified by the Commission in its first report, had been eliminated and in 1945 the superintendent of the

railroad testified "I would say with the operation as it is now there is no interference" (R. 80-81). There was other evidence to the same effect. None of this evidence was in any way contradicted. Nevertheless the Commission found and based its decision upon a finding that conditions in the plant interfered with the railroads performing switching at their operating convenience. As indicated in the appellees' argument in support of the motion to affirm, it is plain that the Commission did this only by disregarding the testimony of its own investigators and of competent and informed railroad witnesses having charge of the operations, and by substituting ideas derived from looking at "a large blueprint showing in detail appellant's plant buildings, facilities and its extensive system of interlacing track" (Motion page 8). The Commission was thus, as the presiding Commissioner indicated during the hearing, basing its decision, not upon the uncontradicted evidence of competent witnesses but upon its "informed experience".

To challenge such findings by the Commission is certainly not to be characterized as mere quarreling with the weight given by the Commission to "undisputed evidence". It is a novel and dangerous conception of the authority of an administrative agency that its function of weighing the evidence entitles it to disregard evidence and make findings directly in conflict with uncontradicted testimony before it, because, in its "informed experience", it thinks it knows better than the witnesses.

Certainly with such challenges here to the Commission's order and to the decision of the court below sustaining it, this Court should not affirm the judgment below without considering the record and hearing the case on the merits.

POINT III

The question as to the effect or non-effect of the Raasch Tariff raises a novel and important issue which should be considered.

The third major question, whether the Commission erred in denying effect to a filed tariff schedule which has not been found to be unlawful or ordered cancelled but is in effect and applicable at appellant's plant, is a question for which previous decisions under Ex Parte 104 obviously afford no precedent. The Commission's decision on this point flies in the face of consistently held views as to the effect of tariffs. This is fully stated by Commissioner Alldredge in his dissenting report. It is a contention supported by decisions of this Court cited therein, including *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516.

In support of their argument, appellees cite *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511. But this decision, far from upholding the action of the Commission here and supporting appellees' contention that it should be forthwith affirmed, supports the position urged by appellant. For that case did not involve a decision by the Commission that a tariff on file, uncancelled and in effect, could for any reason be disregarded. The Commission there had ordered the particular tariff cancelled because in violation of the Act and the issue before the Court was as to the validity of its order. It was as though the Commission here had ordered the Raasch tariff cancelled. If that had occurred, a different problem would be present. But the Raasch tariff was not even under investigation pursuant to any order of inquiry by the Commission and the Commission did not find the tariff unreasonable or order it cancelled. It merely elected to ignore it. But a filed tariff has the effect of a statute which even the Commission may not ignore so long as it is allowed to stand.

CONCLUSION

The motion to affirm should be denied, or, at least, this Court should defer action thereon until it has considered the record, received briefs and heard argument of the appeal on the merits.

Respectfully submitted,

PARKER MCCOLLESTER,
Attorney for Appellant,
25 Broadway,
New York 4, N. Y.

Dated: May 1, 1947.

In the District Court of the United States for the Northern District of Illinois, Eastern Division

CIVIL ACTION No. 46 C 1604

CORN PRODUCTS REFINING COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered December 5, 1946, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff-appellant's

[1] The District Court also made Findings of Fact and Conclusions of Law, though writing no opinion. Upon motion by plaintiff-appellant for a new trial and to set aside the Court's Decree, Findings of Fact, and Conclusions of Law, the District Court entered a written opinion on February 6, 1947, denying said motion.

complaint to set aside an order of the Interstate Commerce Commission dated July 1, 1946. Appeal was allowed on April 3, 1947. Copies of the appeal papers were served on April 4, 1947.

The Commission's order assailed on this appeal concerns plant switching services by rail carriers, and the issues are the same as have been presented in several of the so-called terminal service cases in which the Commission's orders have been uniformly sustained by this Court.[2]

All of these cases, and many others including the case now on appeal, grew out of an extensive general investigation instituted by the Commission on its own motion in 1931, entitled *Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services.* The investigation related to the payment of allowances by carriers to industries for the performance of terminal switching services or the performance of such services by carriers for industries free of charge. On May 14, 1935, the Commission rendered its main report, 209 I. C. C. 11, in which it reached the general conclusion that when a carrier is prevented at its ordinary operating convenience from reaching points of load-

[2] *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402 (1937); *Goodman Lumber Co.* v. *United States*, 301 U. S. 669 (1937); *A. O. Smith Corp.* v. *United States*, 301 U. S. 669 (1937); *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156 (1938); *United States* v. *Wabash R. Co.* (the *Staley* case), 321 U. S. 403 (1944); *Hanna Furnace Corp.* v. *United States*, 323 U. S. 667 (1944).

ing or unloading within a given plant, due to interruption or interference by the desires of an industry or the disabilities of its plant, the service beyond such point of interruption or interference is in excess of that performed in simple switching or team-track delivery.[3] The Commission further concluded that services beyond that point were in excess of the carriers' transportation obligation under their line haul rates, and that the performance of such services by the carriers under such rates, or the payment by them of allowances to shippers for the performance of such services by the shippers, was an unlawful rebate in violation of Section 6 (7) of Part I of the Interstate Commerce Act (49 U. S. C. 6 (7)).

The foregoing findings among others contained in the Commission's basic report were sustained by this Court in the *Tin Plate* case, *supra*, and the standards and general principles therein established have been followed and applied by the Commission ever since in supplemental proceedings with respect to particular industrial plants. The Commission's orders in these supplemental proceedings have been uniformly sustained. The

[3] "Simple switching delivery" and "team-truck delivery" are well understood terms in the lexicon of commerce law. The former means placing a car on a siding leading to a plant. The latter means putting cars on a spur belonging to a railroad to which there is access by wagons or other conveyances, and in this type of switching the unloading must be made at the convenience of the railroad.

few cases in which Commission orders were set aside by lower courts have all been reversed by this Court. The applicable standards and legal principles are thus well settled and now unassailable.

This case is merely another of these supplemental proceedings in *Ex Parte 104* (the 74th). The Commission's order and report here under review, 266 I. C. C. 181, require the carriers named in said order to cease the performance of certain spotting services within appellant's plant at Argo, Illinois, as a part of their line-haul transportation obligation. The order directs that these plant services either be discontinued or be subject to charge.

The contentions urged by appellant in this case are identical with contentions advanced in the other terminal service cases which have been passed upon by this Court. The Government submits that a comparison of appellant's assignment of errors with those urged in previous cases reviewed by this Court convincingly demonstrates that no substantial question is presented by this appeal.

Although appellant raises each and every issue upon which it relied in the court below, it is apparent from a reading of appellant's Jurisdictional Statement that the contention upon which it chiefly relies is the claim that it was denied a full and fair hearing because the Commission excluded as irrelevant certain evidence proffered

by appellant to show "customary practices of carriers in making delivery of cars to industrial plants." As explained by the court below in its opinion of February 6, 1947 (Appendix A-2 of Appellant's Jurisdictional Statement), this evidence was properly excluded by the Commission as irrelevant by virtue of decisions by this Court, and its asserted relevance rested upon a "misconception" by "plaintiff's counsel" which is apparent from "a review of the authorities."

Appellant repeatedly argued that it is the usual and customary practice everywhere in the United States (with the exception of the Staley plant at Decatur, Illinois) for the railroads to perform switching of cars within an industry's plant at the line-haul rates which are treated as full compensation. When confronted with this Court's decision in the *Tin Plate* case where the Court held that "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service" (301 U. S. 402, 410), appellant asserted:

> Now it does not appear in the *Tin Plate* case that either the railroad or the industry offered proof of the custom, and the Supreme Court, therefore, proceeded to its conclusion and assumption that it was not the custom that the line-haul rates covered the spotting service.
>
> Now, *that was an incorrect assumption. The Court, of course, is excused because there was no evidence to the contrary,* but

> we, however, offered evidence here to prove that the assumption was incorrect and that the custom did exist, *exist universally throughout the United States;* that the line-haul rates include compensation for switching cars to and from points of loading and unloading *at every industry except Staley,* where the railroads do the work. [Italics supplied.] [4]

To the contrary, this Court stated in the *Tin Plate* case (301 U. S. 402, 409–410):

> It is asserted by the appellees that it has been customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without charge additional to the line-haul rates. *The record fails to establish any such custom.* * * * *It appears from the record* that the making of allowances has not been governed by any principle and the cases fall into three general classes: (1) where the plant does its own spotting and receives an allowance; (2) *where the railroad does plant spotting;* (3) where the industry does its own spotting and receives no allowance. [Italics supplied.]

Accordingly, as the lower court properly held in its Conclusions of Law, and reaffirmed in its opinion of February 6, 1947, the Commission was not required to receive evidence for the purpose

[4] Transcript of oral argument before the District Court on November 5, 1946, at pages 82–83.

of showing practice and custom because the Supreme Court had settled that question on its review of the Commission's basic record in the *Tin Plate* case. It is not without significance that of the six cases consolidated on appeal in the *Tin Plate* case, one (the *Weirton Steel* case) involved the *rendition of spotting services by the carriers* without charge in addition to the line-haul rates. The Commission's report and order sustained there are thus identical with the situation here.[5]

Moreover, on appeal of the *Staley* case (*United States* v. *Wabash R. Co.*, 321 U. S. 383) in 1944, this Court reaffirmed its holding in the *Tin Plate* case and sustained the Commission's order forbidding carriers to perform spotting services at the Staley plant without charge in addition to their line-haul rates.

The identical contention urged by appellant with respect to receipt of evidence was rejected by this Court in 1944 in *Hanna Furnace Corp.* v.

[5] Further refutation of appellant's contention that the custom existed universally throughout the United States with the exception of the Staley plant at Decatur, Illinois, is contained in the District Court's opinion in *Inland Steel Company, et al.* v. *United States*, 23 F. Supp. 291 (N. D., Ill., 1938). Six terminal service cases were there consolidated and decided in one opinion. One of these cases involved the Crane Company of Chicago, and the Commission's order, consistent with its orders in connection with the Weirton Steel plant and the Corn Products plant, directed the *carriers* to cease performing spotting services free of charge. Moreover, the Crane Company plant, like the Corn Products plant lies within the so-called Chicago switching district.

United States, 323 U. S. 667. The appellant in that case stated the point as follows:

> The appellant contends that a finding by the Commission that the spotting in its plant exceeds the service rendered by the railroads in spotting cars on team-tracks and industrial spur tracks, *without receiving evidence* and determining the extent and relative cost of spotting service on team-tracks, especially in the Buffalo switching district, is wholly arbitrary and without legal basis. [Italics supplied.] [6]

Rejecting this contention as unsound and unworthy of further consideration, this Court sustained the Government's Motion to Affirm.

Equally without merit is appellant's assignment of error with respect to the lower court's conclusion of law that the so-called "Baasch-Jones" tariffs, were inapplicable to the issues under consideration in this proceeding and did not and could not supplant or supersede ***Ex Parte 104*** proceedings. In the first place, the tariff on its face does not purport to apply to switching services which the Commission finds to be plant services not lawfully within the carrier's line haul obligation. Moreover, assuming *arguendo* that the purpose of filing the tariffs was, as contended by appellant, to supersede and supplant ***Ex Parte 104*** proceedings, it could not have much effect as

[6] Appellant's Brief Opposing the Government's Motion to Affirm, Vol. 83, U. S. Sup. Ct. Records & Briefs, No. 132, Oct. Term, 1944, p. 20.

a matter of law. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511.

Appellant's remaining assignments of error relate to the sufficiency of evidence to support the Commission's findings in its report and order. The lower court after benefit of a painstaking review of the evidence of record found that the Commission's report and order were supported by substantial evidence. Appellant's contention here that they were not deserves little consideration.

Appellant's bill of complaint before the court below as well as its discussion of errors assigned here convincingly demonstrate that its real contention with respect to the sufficiency of the evidence is that the Commission should have accepted the evidence which it proffered as to what was the usual and customary service contemplated by and rendered under line-haul rates, and should not have drawn its own conclusions from the undisputed facts showing the actual physical conditions of operations prevailing at appellant's plant.

The contention thus resolves itself into a quarrel with the Commission concerning not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from abundant and undisputed evidence which the record does contain. This familiar type of attack upon the sufficiency of evidence cannot prevail. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 99–100; *Assigned*

Car Cases, 274 U. S. 564, 580–581, 583. As this Court emphasized in *United States* v. *Wabash R. Co.*, 321 U. S. 403, 409: "The controlling question in this type of litigation is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding."

In deciding the scope of the carrier's transportation obligation in this supplemental proceeding, the Commission applied to the situation existing at appellant's plant the standards which had been enunciated in its basic report of May 14, 1935 (209 I. C. C. 11) and approved by this Court in the *Tin Plate* case.[7]

In accordance with these established criteria for determining where the carriers' transportation obligation begins and ends with respect to appellant's plant, the Commission received evidence and based its findings upon facts relating to the plant tracks, the plant buildings and facilities served, the interchange tracks of the carriers, and the actual conditions and circumstances of the physical movement of the cars, including the vital fact as to whether the physical movement occurs at the discretion and convenience of the

[7] In *United States* v. *Wabash R. Co.*, 321 U. S. 403, 412, this Court expressly approved the application of the standards established in the Commission's *Ex Parte 104* basic report to the conditions at the *Staley* plant.

carriers or at the convenience and under the direction and supervision of the industry. The evidence in this case was overwhelming that the switching and movement of cars was at the convenience and under the direction and supervision of appellant.

Both the Commission and later the District Court had before them a large blueprint showing in detail appellant's plant buildings, facilities, and its extensive system of interlacing tracks connecting with the rail facilities of the Chicago Belt, the Indiana Harbor Belt, the Alton, and the B. & O. Chicago Terminal railroads. The plant lay-out extended over an area of approximately 200 acres and included 23½ miles of trackage. In and of itself, the complicated design of the plant prevents the servicing carriers individually or collectively from removing and delivering cars at the loading and unloading points in a continuous movement without interruptions and interferences. This includes the fact—which the record shows appellant did not attempt to deny or refute—that all cars moving in or out of the plant are first moved to and come to rest upon a series of thirteen plant tracks, customarily and regularly used as interchange tracks in switching the plant.

The Commission's reports under attack in this case describe all the foregoing in detail. On the basis of a voluminous record of physical data and pattern of operations which had been accepted

by this Court as controlling in all previous terminal switching cases, it is difficult to perceive how the Commission or the District Court could have reached conclusions other than they did. Appellant's contentions to the contrary are merely a familiar example of efforts to have this Court substitute appellant's judgment for that of the Commission in determining the value and weight to be attributed to evidence. This the District Court properly refused to do.

For the foregoing reasons, it is respectfully submitted that no substantial question is presented by this appeal, and that the judgment of the District Court should be affirmed.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 1309. Corn Products Refining Co. *v.* United States et al. Appeal from the District Court of the United States for the Northern District of Illinois. June 2, 1947. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Wabash R. Co.*, 321 U. S. 403. *Ernest S. Ballard* and

Parker McCollester for appellant. *Acting Solicitor General Washington* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 69 F. Supp. 869.